

COMMON OWNERSHIP COMMUNITY MANUAL & RESOURCE GUIDE



Prepared by:
Montgomery County
Commission on Common Ownership
Communities

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CHAPTER 1

ASSOCIATION ORGANIZATION: GOVERNING STANDARDS AND DOCUMENTS

MARYLAND STATUTES AND MONTGOMERY COUNTY CODE

This chapter discusses the most-commonly-used laws and most important documents that determine the legal standing, authority, and activities of common ownership communities. These laws include:

- Maryland Condominium Act (Real Property Article, Annotated Code of Maryland, Sections 11- 101, et seq.);
- Maryland Homeowners' Association Act (Real Property Article, Annotated Code of Maryland, Sections 11B-101, et seq.);
- Maryland Cooperative Housing Associations Act, (Corporations & Associations Article, Annotated Code of Maryland, Sections 5-6B-01, *et seq.*);
- Maryland Contract Lien Act (Real Property Article, Annotated Code of Maryland, Sections 14-201 to -206);
- Relevant sections of the Corporations & Associations titles of the Annotated Code of Maryland; and
- Chapters 10B, 11A and 24B of the Montgomery County Code.

This chapter also describes: (i) the Declaration of Covenants, Conditions and Restrictions, (ii) Master Deeds, (iii) Articles of Incorporation, and (iv) the Bylaws, collectively referred to as the "governing documents." State and County statutes provide the basis for establishing common ownership communities, which are also often referred to as community associations, planned residential developments, and/or common interest developments.

The management and governance of (HOA) common ownership communities are outlined in the association's governing documents. The Declaration, sometimes called the Declaration of Covenants, Conditions, and Restrictions (CCRs), imposes architectural guidelines and use limitations on the exterior of the privately-owned properties or residential units within the association. These controls are intended to provide uniform standards for the community and some protection of the property values. The CCRs also give the association the legal right to charge fees for the management and maintenance of the community. The Declaration is intended to regulate resident behavior within the community. State laws and the governing documents jointly empower the association to adopt and enforce rules and regulations as the association deems pertinent to resolve problems and govern the everyday routines and activities within the community. This combination of laws, governing documents, and adopted policies and regulations makes each association a distinctly separate and unique entity.

The primary difference between a homeowner's association (HOA) and a

condominium association is in the ownership of the common grounds and the common elements. In a homeowner's association, the common grounds and facilities (if any) are owned in fee simple by the association as an entity; all members have a right to use, and an obligation to fund the maintenance of, the common grounds and common elements. In a condominium, each individual unit owner also owns an undivided interest in all common grounds, streets and parking, recreation facilities, utilities, and parts of the residential structure (i.e. the roof and lobby), which are collectively known as the "common elements." The condominium association, sometimes referred to as the Council of Unit Owners, typically owns no part of the common elements.

In both types of property ownership, the association is legally responsible to maintain, repair, replace, and manage the common grounds/elements, and has the authority to adopt and enforce rules and regulations for the members' use of the common grounds/elements. These differences are substantial enough to require separate statutes in the Annotated Code of Maryland. In certain cases, the Montgomery County Code provides further statutory authority to enforce association covenants, bylaws, rules and regulations, and/or to become involved in an association's business, membership, or other internal matters. Beyond these State and County laws, the association's self-governance takes place through its internal due-process procedure, alternative dispute resolution methods, or civil actions in court, which may be initiated either by the association or by a member.

Association membership, rights, and obligations are mandatory and automatic with the purchase of a property or residential unit subject to its governing documents. This mandate for association membership runs with the land and automatically transfers to each new owner every time the property or unit is sold. This mandatory membership cannot be waived or voided by an owner and is enforceable by law. This also assures each member's right to use the common facilities and grounds and imposes upon each member an obligation to share in the common expense and responsibilities of governance. The association has the lawful authority to annually assess and collect fees for maintenance of the community and operation of the association; to enforce the covenants, conditions, and restrictions; and, if necessary and provided for in the governing documents, to levy monetary penalties or assessments for violations thereof.

Some associations call themselves “townhouse associations.” Legally, there is no such type of association. All associations are either HOAs, condominiums, or cooperatives. The Declaration will state which one it is.

A cooperative is significantly different from both HOAs and condominiums. A cooperative is a corporation, and the members are the stockholders of the corporation. The cooperative corporation owns the land and buildings. A stockholder has the right to rent a lot or a unit from the corporation, but the cooperative has the right to decide who can be a member or stockholder. Members do not own their lots or units. So, in a cooperative, the member is simultaneously a part owner of a company that is a landlord, and a tenant of the landlord. A cooperative's chief documents are its corporate charter, its bylaws,

and its leases.

Unlike HOAs and condominiums, a cooperative has the right to evict members who are in violation of their leases or not paying their fees. It exercises this right by filing a lawsuit in the Landlord & Tenant Court.

A. Maryland Condominium Act

Anyone involved in the governance of a condominium must understand and be familiar with the Maryland Condominium Act, which is found within the Real Property Article of the Annotated Code of Maryland, Sections 11-101, *et seq.* This statute imposes specific limitations, restrictions, responsibilities and obligations that may not be included in the recorded documents. Among the more important provisions of the Condominium Act are the following:

Section 11-101. Definitions: The Condominium Act provides a common framework for specific terms relative to condominium governance. These include:

- Board of directors (or Board): the persons to whom some or all the powers of the council of unit owners have been delegated;
- Council of unit owners: the legal entity described in Section 11-109 of the Condominium Act;
- Governing body: the council of unit owners, board of directors, or any committee of the council of unit owners or board of directors, depending on the legal authority it has been delegated;
- Unit owner: the person, or combination of persons, who hold legal title to a unit.

Section 11-102. Establishment of Condominium Regime: Identifies how and when a condominium is officially established, including conversions of an existing property to a condominium.

Section 11-103. Declaration: Identifies and provides the minimum components of a condominium declaration. These include, but are not limited to:

- The name of the condominium, which must include the word "condominium," or
- Have the words "a condominium" immediately follow the name; a general description of each unit, including its perimeters, location, and any other data enough to identify it with reasonable certainty;
- General common elements and limited common elements;
- The percentage interest appurtenant to each unit (referring to Section 11-107. Percentage interests); and
- Amending the Declaration, including what may and may not be amended, and the percentage of unit owner approval required for each.

Note: The statutory requirements to amend a condominium Declaration do not

apply to the Board's authority to designate handicapped parking spaces in accordance with Section 11-109(d) (22).

Section 11-104. Bylaws: Identifies and provides the minimum components of the bylaws which are to be recorded with the declaration. If the condominium is incorporated, the bylaws become the corporate bylaws.

B. Maryland Homeowners' Association Act

Anyone involved in the governance of a homeowner's association (as distinguished from a condominium or cooperative) must understand and be familiar with the Maryland Homeowners' Association Act ("HOA Act"), which is found in the Real Property Article of the Annotated Code of Maryland, Sections 11B-101, *et seq.*

In a homeowner's association, the land is subdivided into residential lots and common grounds. Each lot is privately owned, taxed, and assessed association dues, whereas the common grounds and facilities are owned in the name of the association.

The association is legally established and defined when the Declaration of Covenants, Conditions and Restrictions, and approved subdivision site plan are filed in the Land Records of the County Circuit Court. The Bylaws, if any, can be filed in the Land Records **or** in the Homeowners' Association Depository (located in the Civil Files section of the Office of the Clerk of the Court for the County where the Association is located). These documents may contain restrictive or permissive easements, covenants or other regulations that apply to and govern the use of all lots included in the association. Recordation of these approved documents legally defines and establishes the entity and the mandate for association membership.

At this point in time, the developer/declarant is the association's only member and, thus, possesses majority voting control of the association until the first property is sold. Thereafter, the owner membership and owner control grow with the purchase of each lot or unit. Usually, the governing documents establish different classes of membership such that the developer has more votes per unsold lot or unit than the new owners. This means that the developer maintains voting control of the association until sales reach the necessary percentage of ownership for the members to assume control of the association and its operations. Eventually, all the properties or units in the association, together with the voting rights, are sold and the control and operation of the association is taken over by the owners themselves.

Among the more important provisions of the HOA Act are the following:

1. Section 11B-101. Definitions.

The HOAA provides a common framework for specific terms relative to HOAA governance. These include:

- Common areas: property which is owned or leased by a

homeowner's association;

- Declaration: the instrument recorded in the land records of the county in which the association is located that creates the authority for a homeowners' association to impose on lots, or on the owners or occupants of lots, or on another homeowners' association, condominium, or cooperative housing corporation any mandatory fee in connection with the provision of services or otherwise for the benefit of some or all of the lots, the owners or occupants of lots, or the common areas. ***Note, that the core requirement that separates a homeowner's association that is regulated by this law from other associations which are not regulated is the requirement that the association must have the legal right to impose mandatory fees or assessments on its members. Associations that do not have this right are not regulated by the HOA Act.***
- Depository; homeowners' association depository: the document file created by the Clerk of the court of each county and the City of Baltimore where a homeowner's association may periodically deposit information as required by this title;
- Governing body: the homeowners' association, board of directors, or other entity established to govern the development;
- Declarant: a person having the authority to enforce the provisions of a declaration, and includes an incorporated or unincorporated association;
- Recorded covenants and restrictions: any instrument of writing which is recorded in the land records of the jurisdiction within which a lot is located, and which instrument governs or otherwise legally restricts the use of such lot.

2. Section 11B-104. Building code or zoning laws, ordinances, and regulations to be given full force and effect; local laws, ordinances, or regulations. Provides full force and effect to homeowner's associations of all laws, ordinances, and regulations concerning building codes or zoning.

3. Section 11B-111. Meetings of homeowner's association or its governing body.

Requires all meetings of homeowners' associations, including boards of directors or other governing body, or association committees, to be open to all members of the homeowners' association or their agents. Also requires reasonable notice to be given to all members of the association of all regularly scheduled open meetings of the homeowners' association.

C. Cooperative Housing Corporation Act

1. Sections 5-6B-01 to 12. These sections regulate the establishment of the corporation by the developer and provide for warranties and other consumer

protections from the developer to the cooperative.

2. Section 5-6B-15. Cooperatives are subject to the general provisions of corporation law as set out in the State's Corporations & Associations Article.
3. Section 5-6B-22. The cooperative may regulate no-impact home businesses under certain conditions.
4. Section 5-6B-23. Members have the right to display signs supporting or opposing political candidates or referenda during a campaign season.
5. Section 5-6B-26. Provides that the cooperative's records must be available for inspection by members, with limited exceptions.
6. Section 5-6B-19. Members have the right to attend the meetings of the Board or other governing body, with limited exceptions.
7. Section 5-6B-20. Members have the right to distribute and post information on the cooperative's operations in any manner that the cooperative uses to distribute similar information.
8. Section 5-6B-30. The cooperative must have a procedure to enforce its rules that provides due process to the members, including notice of the alleged violation, the right to a hearing on the violation, and the right to abate the violation within a certain time without penalty.

D. Montgomery County Code

Mandatory Training

BEGINNING IN 2016, MONTGOMERY COUNTY ADOPTED A LAW THAT REQUIRES ALL ASSOCIATION DIRECTORS TO TAKE A FREE CLASS IN HOW TO MANAGE A COMMUNITY ASSOCIATION. The director must take the class within 90 days of being elected, or reelected, to the board. The director only needs to take the class one time. Members of associations are not required to take the class but the County strongly encourages them to do so. (If a member takes the class, and is later elected to the board, the member does not have to take the class again.) A director who does not comply with the law is potentially subject to a fine of \$500. The class is available online through the Commission's website and takes approximately 3 – 3.5 hours to complete.

Elections

Section 10B-17 states that:

- The board must give at least 10 days but not more than 90 days advance notice of an election.
- All election materials prepared with association funds must list candidates in alphabetical order and cannot suggest any preference.
- Unsigned absentee ballots are not valid unless received in a signed, sealed envelope with the identification of the unit and the % of ownership, if any, on the outside of the envelope, and can only be opened at a meeting at which the candidates can attend.
- **All proxy ballots and powers of attorney must identify the candidates for whom they are to be voted ("directed" ballots); undirected proxies and powers of attorney cannot be used to vote for candidates, but they can be used to establish a quorum for the meeting and for voting on other business.** However, a general power of attorney, not created only for use in an election, can be used for any purpose, including voting for candidates even if it is undirected.
- Cumulative voting (that is, being able to cast all votes for a single person) is prohibited.
- **Votes may not be opened or counted until the time for voting closes.**
- Unless the governing documents state otherwise, board members serve 2-year terms, and terms should be staggered so that as close to one-third of the board as possible is up for election each year.

Budgets

Section 10B-18 requires associations to give at least 30 days advance notice to the members of the proposed budget before the governing body (usually, the board of directors) can vote on the budget and the governing body must also give at least 30 days advance notice of any amendment to the approved budget if the amendment will result in an increase or decrease of more than 15% (*this requirement does not apply if the change in the approved budget is necessary to respond to an imminent threat to health or safety or of serious property damage*).

Amendment of HOA Bylaws

Section 24B-7 allows a homeowners' association to amend its bylaws by a vote of a simple majority of its lot owners, *even if* the HOA's own governing documents set a different requirement. (or 60% in good standing)

Renewable Energy Devices

Section 40-3A prohibits creating or enforcing any rule that would prevent the owner of a building, unit in a building, or lot from installing a renewable energy

device (specified in the code) on the owner's own property, if the device has been approved by a national testing agency.

Please remember, Montgomery County COMCOR 10 B requires the following:
At least annually, the Governing Body must notify the membership of the existence of the Commission on Common Ownership Communities and its function.

Sec. 10B-7 A. Notification requirements. The governing body of a community association must, at least annually, distribute information in a form reasonably calculated to notify all owners about the availability of dispute resolution, education, and other services to owners and residents of common ownership communities through the Office and the Commission. The governing body may satisfy this requirement by including with any annual notice or other mailing to all members of the community association any written materials developed by the Office to describe the Commission's services. (2010 L.M.C., ch. 10 , § 1.)

At least Annually, the Governing Body must register the Association with the Commission.

Sec. 10B-7. Registration; fees. (a) (1) Each common ownership community must register with the Commission annually, and identify its elected leadership and managing agents, on a form provided by the Commission. (2) Failure to register, or making a false statement on a registration form, is a class A violation and also makes the community ineligible to file a dispute under Article 2. (3) The governing body of a homeowners' association, the council of unit owners of a condominium, and the board of directors of a cooperative housing corporation are responsible for compliance with this subsection, including the payment of any registration fee.

Board members to complete Training Program

Sec. 10B-17. Voting procedures; training. (h) A member of the governing body of a common ownership community must successfully complete the educational curriculum developed by the Commission or a similar educational curriculum administered by another organization that is approved by the Commission within 90 days after being elected or appointed to the governing body for the first time. The governing body must:

- (1) certify that each member has successfully completed this training to the Commission;
- (2) retain a copy of the certificate of completion for inspection by the members of the association for the duration of the governing body member's service; and
- (3) report to the Commission no later than December 31 of each year membership data required by the Commission, including
 - (A) the name and address of each member of the board;
 - (B) the date each member completed the required training;
 - (C) the number of vacancies on the board; and
 - (D) the length of time each vacancy existed.

Editor's note-2015 L.M.C., ch. 2, § 2, states: Each member of the governing body of a common ownership community who was appointed or elected before this

law takes effect must successfully complete the training requirements contained in Section 1 within 90 days after being elected for a new term of office that begins after this law takes effect.

THE ASSOCIATION'S GOVERNING DOCUMENTS

Governing documents of an association must be in compliance with federal, state and local regulations, statutes and ordinances.

1. The Declaration of Covenants, Conditions and Restriction (CCRs)

"CCRs," also referred to as Master Deeds or Proprietary Lease/Occupancy Agreement in the case of cooperatives, establishes the HOA and sets forth the rights and obligations of the owners and their association. In essence, the Declaration serves to bind the owners to the association. The Declaration/CCRs typically include:

- Description of each parcel, lot or property subject to the association membership and its covenants conditions and restrictions
- Types of housing permitted
- Requirements for the property owners' association to be responsible for the maintenance and improvement of common property
- Definition of membership requirements and obligations; provision for a governing body; and assigned voting rights of each type of association member
- Provision for the annual assessment of each lot to raise the funds to maintain the common areas, provide community services, and operate the association
- Requirement for prior association approval for all exterior changes or additions to any private lot or structure and provisions for association enforcement
- Provision for members' access and use of the common grounds and facilities
- Plats
- Percentages of ownership interest
- Defining membership requirements and obligations
- Assigning/Defining voting rights of each type of association member
- Method for amendment

Note: Any amendment to the Declaration must be officially ratified by a vote of the owners. Any amendment must be consistent with the state law and current zoning requirements, and filed in the Land Records. Amendments to other documents, no matter how small or insignificant, may have to be recorded either in the Land Records or in the HOA Depository for 30 days to supersede the former record and to become legally enforceable.

2. Bylaws

The bylaws of a community association are its administrative rules. The bylaws detail the authority and responsibility of the board, and the rights of the members, and must be recorded in the County Land Records for condominiums, and in the Depository for homeowners' associations. Effectively, the bylaws are the association's operational and procedural manual.

In cases of conflict, the Declaration takes priority over the bylaws, and the bylaws have higher standing than adopted rules and regulations or policy resolutions of the association. Typically, bylaws specify:

- Requirements for the annual membership meeting, for special meetings, and the notices required prior to these meetings;
- Rules for the conduct of meetings, *i.e.*, the agenda, the order of business, quorum requirements, vote requirements for passage of different types of business items, etc;
- The number of directors, the length of their terms of office, methods of election and recall and notice for and number of board meetings;
- The association's officers, their powers and duties, and the method and frequency of their election;
- Committees that may be established to advise and assist in the management of the association;
- The method for amending the bylaws and other governing documents;
- Bonding and insurance requirements;
- Enforcement of the declaration, bylaws, rules and regulations;
- Maintenance of association properties;
- Establishment of sound financial procedures, financial reports and the budget; maintenance of the books and records, assessment levels, and collection of assessments;
- Purchase of required hazard and liability insurance;
- Employment of staff, and definition of their duties; and
- Appointment of committee members and supervision of their duties.

The bylaws often specify members' rights, including the right to vote in person or by proxy, the right to inspect the association books and records, the right to receive proper notice of meetings and assessment levels. The bylaws may also reiterate the members' responsibilities to pay both the annual and any special assessment, to follow restrictions outlined in the declaration and bylaws, and to abide by the rules and regulations established by the board of directors.

3. Rules for adoption

- A. Section 11-111 of the Condominium Act states that the council of unit owners or the board (if so delegated in the bylaws) may adopt rules for the condominium if each unit owner is sent a notice that includes the proposed rule,

the right to submit written comments on the proposal, and the proposed effective date of the proposed rule; there must be an open meeting of which the members are given at least 15 days notice and at which the members and tenants can comment; a proper quorum of the council of unit owners or the board is present; and the proposal is adopted by a majority vote. The vote shall be final unless, within 15 days after the vote, at least 15% of the members of the association sign a petition calling for a special meeting of the council of unit owners to vote on the new rule. If such a special meeting is called, the new rule can be repealed if more than 50% of those present and voting disapprove of the new rule and are at least 33% of the total votes in the association.

The association or its board cannot adopt rules that are inconsistent with the covenants or bylaws.

There is no similar law for HOAs, but their rules may create a similar procedure.

B. Basis for rules in governing documents

Both condominiums and homeowner association boards of directors are usually granted the authority to adopt rules and regulations by the covenants and bylaws of the association. Maryland courts have also recognized this authority. As one court wrote about an association's right to adopt rules:

"House rules, (sometimes called household regulations or rules of conduct), are rules and regulations of a condominium that generally deal with the use and occupancy by owners of units and common areas, patios and other exterior areas, parking, trash disposal, pets, etc. They frequently prohibit conduct that could constitute a nuisance. **It has been said many times by many courts that if the house rules are reasonable, consistent with the law, and enacted in accordance with the bylaws, then they will be enforced.**" (Emphasis added.)

Note, that while the rules of cooperatives and condominiums need not be filed with any government agency, the Maryland Homeowner Association Act states that an HOA may not enforce any bylaw, rule or regulation until the HOA has filed it in the Circuit Court's HOA Depository. (Section 11B-112.)

4 Architectural guidelines and use limitations providing uniform standards for the community and some protection of the property values.

Architectural control ranks with the power to impose assessments, as one of the most important parts of the governing documents. The power to control the appearance of the community, including the appearance of privately-owned lots and buildings, is usually generally found in the Declaration of Covenants and in the Bylaws. Many communities, especially HOAs, have adopted detailed rules on the subject. A core provision of these plans is the requirement that every owner first obtain permission for any proposed change to his home or lot *before* making the change. Where the existing rules do not cover a specific proposal, Maryland courts have ruled that the board of directors or the architectural control committee has the right to apply its own judgment and its own interpretation of the

rules and overall plan of architectural appearance, and the courts will not second-guess the association's interpretations so long as they are reasonable and consistent with the overall design plan.

DISCLOSURE REQUIREMENTS

Due to the special scheme of property ownership and authority found in community associations, prospective purchasers need to know the various rights, responsibilities and authorities of the association and its members before they buy a home. They also need to know that the lot or unit is in good standing with the association in regard to its assessment account and its compliance with the covenants, conditions and restrictions of the governing documents. To accomplish this, the Condominium and Homeowners' Association Act require the seller of a unit or lot to provide an association-prepared package to the purchaser that discloses that the property is located in an association subject to all provisions and requirements of the respective Acts. Some of the required disclosures for condominiums include:

- * copies of the governing documents (CCRs)
- * the current monthly and special assessments and any other fees, and whether the seller's account is delinquent
- * any planned capital expenses not already part of the current budget
- * the most recent balance sheet and income/expense statement
- * the current operating budget, including the reserve fund
- * any judgments or pending lawsuits against the association
- * information on the association's insurance policies
- * whether the association has any claims against the unit or lot for violations of law or of its rules
- * whether the unit or lot owner knows of any conditions in the unit or lot that violate the law or the rules.

Some of the required disclosures for HOAs include:

- * the current monthly and total annual fees, assessments and other charges
- * whether the lot is current in the payments due for it
- * how to contact the manager or other agent for the HOA
- * whether the owner knows of any pending lawsuits or unsatisfied judgments against the HOA
- * whether the owner knows of any pending claims or violation notices against his lot
- * copies of the HOA's governing documents.

New cooperatives must also give disclosures similar to those above; however, existing (older) cooperatives are not required by law to give any disclosures.

The association may impose and collect a charge reflecting the actual cost of the preparation of the disclosure packet. The maximum fee may be set by law. The

association is legally bound by its statements in the packet regarding the status of the assessment account and violations of architectural guidelines on the property. If the association fails to provide the packet on time, it will likely be unable to collect delinquent assessments attributable to the seller.

The Commission offers (and has online) a brochure on "How to Buy a Home in a Condominium, Cooperative or Homeowners' Association" which it encourages associations to give to prospective buyers. It has another, shorter brochure on "What You Need To Know About Your Association." By educating future members as early as possible about what it means to live in an association, the association can encourage participation and avoid violations of its documents.

CHAPTER 2

BUILDING A STRONG COMMUNITY

THE OWNER/LEADER PERSPECTIVE

An owner in a community with a common ownership community generally wants everything run smoothly with minimal interference with his own property. An owner needs to recognize that a board has to do a number of things to comply with the community's governing documents, as well as with County and State statutes and regulations. In addition, there are some things that are not "required," but are good ideas for developing and maintaining a well-functioning community.

I. BUILDING & PROVIDING LEADERSHIP

Board members as community leaders

Board members should set good examples for the community. First and foremost, they should follow the rules themselves, and avoid the appearance of impropriety. They should pay attention to the community needs and assets. Sound overwhelming? Described below are ways to bring in others to help.

Developing and utilizing a committee system

To encourage more participation in decision making in the community a board might consider using a committee system to spread out the work. Many communities have an Architecture Committee. Bylaws or Social Committees are also possible.

Encouraging community volunteers as future community leaders

If you are on the board now, you won't be forever, and if you are a homeowner, you certainly want to ensure good leadership for the future. How can you do this? One of the best ways is to encourage homeowners' that may have an interest and skill set that would be useful in the future and invite them to participate in a smaller activity, such as a committee or event member. Encourage them to provide ideas at membership meetings or board meetings. Start giving them more responsibility (but not too much – an overloaded volunteer may be more likely to back away than to step forward). Eventually, they may be willing to take on a board position.

II. NURTURING RELATIONSHIPS

The Inclusive Board and Involved Homeowners'

The best decisions tend to be those that have been made in the open, explained and discussed, with input received and fully considered. The hardest decisions to

implement are those that have been developed without input or without sufficient explanation. People don't like to feel that they don't have a say in their community.

Enhancing relationships between homeowners' and association leadership

In the same way, building relationships will help strengthen communities. Be careful to build relationships with everyone in the neighborhood. It is hard to reach beyond the group that comes forward all the time to express its views or to shoulder the workload but try to include those who don't step forward on their own. If time or other commitments stand in the way of others volunteering, seek their ideas on how to get their input or help. However, keep in mind that sometimes people don't want to be involved no matter what.

III. EDUCATION ABOUT THE COMMON OWNERSHIP COMMUNITY (COC) CONCEPT

Educating Board and Committee Members

Board members need to understand both the concepts behind a community association and the responsibilities of the role of board member (as opposed to a homeowner). The board should provide information to new board members when they begin their terms. Information can be offered through many ways. One or more information sessions could be offered by other board members, the association manager or attorney, or a local association group, such as Community Association Institute (CAI) or Maryland Homeowners' Advocacy Alliance (MHAA). Alternatively, the board could prepare a handbook or recommend a published book explaining board responsibilities and require new board members to read it.

Educating Owners

In addition, there are some homeowners' who may not understand the concept of COC's or the role of the board. The board should take steps to help new and existing homeowners' understand both. The board should reach out to prospective and to new owners as soon as possible, and it could offer information sessions for homeowners' or provide the information in written form by producing articles for a newsletter, posting information on a website, or maintaining a community library on the topics of COC's and board responsibilities. The CCOC also publishes an educational booklet on "How to Buy a Home in a Condominium, Homeowners' or Cooperative Association" which also contains general information on what living in a common ownership community will involve, and it should encourage sellers and real estate agents to give the booklet to prospective buyers.

BEGINNING IN 2016, MONTGOMERY COUNTY ADOPTED A LAW THAT REQUIRES ALL ASSOCIATION DIRECTORS TO TAKE A FREE CLASS IN HOW TO MANAGE A COMMUNITY ASSOCIATION. The director must take the class within 90 days of being elected, or reelected, to the board. The director only needs to take the class one time. Members of

associations are not required to take the class but the County strongly encourages them to do so. (If a member takes the class, and is later elected to the board, the member does not have to take the class again.) A director who does not comply with the law is potentially subject to a fine of \$500.

IV. GOVERNING REASONABLY

Neither over-govern nor under-govern. There are a couple of things to keep in mind while striving to meet the right balance.

Rules should be logical, sensible, and sound

When drafting rules, you should keep in mind what the purpose of the rule is and whether you have rules that already cover the matter to be addressed. Do you need the rule? Is the rule clear on its face or will the rule be subject to different interpretations? Do other rules need to be revised in light of the new rule? You probably want to consult the association's attorney when drafting the rule and reviewing the need.

Is "the letter of the law" necessary or does a rule need to be changed?

You should arrange to periodically review your community's rules. Consider whether your rules are too strict or drafted in such a way as to no longer accomplish what it was intended to accomplish. If you find a rule that seems unusual, see if you can determine why it was created. Does that situation still exist? Has it become obsolete? Is there a better way to accomplish what needs to be accomplished? You want to ensure that your rules are enforced fairly, but not thoughtlessly.

V. PRACTICING JUSTICE FOR ALL

Fair hearings

In governing, remember that there must be fair hearings for homeowners' where there is an allegation of violation of some rule or policy. Otherwise, there will be no respect for the governing body, and this can lead to problems down the road.

Right of appeal before imposing fines or other "punishment"

Make sure to offer a fair opportunity for a homeowners' to explain before the board their version of their actions before assessing a fine or take other remedy.

Understanding the requirements of the Maryland Condominium Act, Maryland Homeowners' Association Act, and Montgomery County Code

Board members in particular should make time to read the documents that govern their actions, including the State and County statutes. If they do not understand them, they should seek counsel from the association attorney or other knowledgeable source. The Board should also make these documents freely accessible for the members of the association in a common library or through an online source.

VI. ENCOURAGING CONSENSUS

Typically, decisions are better followed when there is a consensus supporting them. There are several ways to ensure the best possibility that decisions are made with consensus.

Identify controversial issues and engaging in interactive communication with the community

Make sure to evaluate whether the proposal before the board is likely to be controversial. If you think it might be, present it to the community before acting on it. Make sure, through written material and meetings, that the idea is fully explained and understood. Remember that understanding a proposal does not mean acceptance or agreement with a proposal.

Seek community input prior to controversial decisions by the Board

Find out what the community thinks about the proposal before voting on it. Having an open forum at a meeting for community input can be useful, but is not the only way to hear from community members. Perhaps send out a survey, or have an informal gathering at different times of the week or day to try to get feedback from as many as you can. The Board might find it helpful when acting on a controversial issue to refer it to the general membership for a vote, rather than deciding on the proposal itself.

Understand minority views

If there are some in the community who do not agree with a proposal, find out why. See if it is a fundamental disagreement or a disagreement about some aspect of the proposal. For example, someone might like the proposal but think it costs too much as proposed. A solution might be to see what elements of the proposal could be removed to reduce the cost and still accomplish much of the original proposal.

PREVENTING AND RESOLVING CONFLICTS

Sometimes conflicts arise. In the event the conflict cannot be resolved within the community's own procedures, it may be possible to resolve the matter with alternative dispute resolution.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) takes many forms. It can range from two people talking between themselves to a third party deciding what the answer should be.

1. Facilitation

Facilitation involves the use of techniques to improve the flow of information between parties to a dispute. A facilitator does not usually become involved in the substantive issues and preferably should not be a party to the dispute. The facilitator focuses on the process involved in resolving a matter. In sum, the goal of a facilitator is to help the participants communicate to resolve an issue.

The facilitator generally works with all of the participants at once and provides procedural directions for the group to move through the problem-solving steps of the meeting and arrive at a resolution. The facilitator may be one of the parties to the dispute but preferably should be someone unrelated to the dispute. Facilitators typically remain impartial to the topics or issues under discussion.

Use of facilitation is most appropriate when: the intensity of the parties' emotions about the issues inhibits good communication; the parties or issues are not extremely polarized; the parties have enough trust in each other that they can work together to develop a mutually-acceptable solution; or the parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome.

2. Mediation

Mediation involves an impartial and neutral third party to aid in resolving a dispute. The mediator typically has no decision-making authority, but will attempt to assist the parties in voluntarily reaching an acceptable resolution of the issues in dispute. The mediation process is voluntary and usually confidential.

A mediator, like a facilitator, makes procedural suggestions regarding how parties can reach agreement. A mediator may also suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator can work with the parties individually, or with all parties present, to develop interests and explore options that address their interests.

The Conflict Resolution Center of Montgomery County will provide free mediation services on request.

3. Arbitration

In arbitration, parties or their representatives present a dispute to an impartial individual or panel for issuance of a decision. The arbitration may be either non-binding or binding.

Arbitration is appropriate when the parties want a third party to decide the outcome of their dispute, but would like to avoid the formality, time, and expense of a trial as well as have more control over the decision-making process. A non-binding decision would be used to advise the parties of a possible outcome in a trial and does not prevent the parties from seeking a trial or other resolution of the dispute. In a binding arbitration, the parties generally cannot appeal the arbitrator's award, so it is a final determination.

Mediation and the CCOC

The CCOC will require that the parties attempt to resolve their dispute through mediation before the CCOC will accept a proceeding for consideration. Occasionally, the CCOC will accept a proceeding and then direct the parties to try mediation one more time. The CCOC offers both in-house CCOC volunteer mediator's and external mediation. (See Chapter 12 for more information.)

VII. POSITIVE REINFORCEMENT FOR VOLUNTEER EFFORTS

In most cases, if you do not acknowledge the work of your volunteers, you will lose them and not attract others.

Empower volunteers

If a board uses volunteers, it should make sure to give them the ability to make actual contributions. If you give homeowners' jobs but then constantly overrule or redo their work, you risk undermining the desire of members of the community to volunteer. Try to empower your volunteers to be able to make recommendations that you can adopt or carefully delegate to the volunteers the ability to make decisions on certain matters.

Public appreciation of volunteers

Once a board has acquired volunteers, it should make sure to recognize them publicly. It can be through mentioning their work in newsletters or making mention of them at board or community meetings. Anyone who commits time to work for the association wants to know that the effort was appreciated.

Suggested related publications

Regarding Board Functions:

Dunbar, Peter M. and Marc W. Dunbar, *The Homeowners' Association Manual*. Sarasota, FL, Pineapple Press, Inc. 2004

Community Association Institute, *The Board Member Tool Kit: A Guide for Community Association Volunteer Leaders*

Regarding HOAs in general:

Coleman, Marlene M. and Judge William Huss, *Homeowners' Association and You: The Ultimate Guide to Harmonious Community Living*. Nashville, TN, Sphinx Publishing, 2006.

CHAPTER 3

BOARD, ANNUAL AND SPECIAL MEETINGS

I. ANNUAL AND SPECIAL MEETINGS OF OWNERS

The democratic process is alive and well in association meetings across our nation. However, the democratic process in associations requires order and rules of procedure and behavior so that boards of directors and the owners can work together to preserve, protect and enhance the value of the property and maintain a strong sense of community.

Annual Meetings

Typically, the bylaws set forth criteria for the annual meeting, including notice, quorum, voting, and proxy procedures. Almost uniformly, the bylaws state that the annual meeting is held to elect directors and to conduct such other business as may properly be brought before the meeting.

Other business may include, by way of example and not limitation, the presentation of officer and committee reports, presentation and/or approval of the annual budget, voting on special assessments (if required) and voting on proposed amendments to the governing documents. Unless otherwise set forth specifically in the bylaws or other governing documents or relevant laws, any business which may appropriately come before the body can be entertained and, if needed, voted upon. It also can provide a forum for discussions on various aspects of association life and for non-binding, straw votes of the owners that can be used by the board as a tool to determine constituent interests. In addition, the annual meeting presents an opportunity to strengthen relationships within the community by bringing neighbors together.

At annual meetings, members have the right to speak out on any topic of association business and may also have the right to vote on certain proposals; but any proposal to amend a bylaw or covenant must obtain the proper majority required by those documents for amendments.

Special Meetings

Special meetings generally focus on one particular matter, and this matter should be clearly spelled out in the notice of the meeting. Care must be taken when drafting special meeting notices. Imprecise language or an unclear purpose can render the meeting invalid.

For example, as most bylaws require the association to notify any board director of his or her proposed removal, the association must provide such notice to each before taking action. Use of the phrase "one or more directors" is imprecise, thus problematical. However, the bylaw requirement would not pose a problem if

the notice proposed the removal of all directors.

Most bylaws do not allow the owners to take any action at a special meeting on a matter that is not one for which it has been specifically called, even if a majority of all owners are present. **The notice and reason for the meeting should specify the reason for the meeting, likewise, the agenda should not deviate from the notice.**

Special meetings differ in one other significant respect from annual meetings. Bylaws usually allow a group of owners to call a special meeting. **To call a special meeting, a minimum number of members must sign a petition and present it to the board president or secretary. The petition must precisely state the purpose of the meeting.** The president or secretary then calls the meeting for the purpose contained in the petition. The special meeting provides a setting for residents to have an open discussion about the topic of interest of concern for which the meeting was called. Ideally, the special meeting allows the community to come to a consensus and/or resolve an issue. Even if consensus is not reached, the special meeting provides board members with valuable insight into the interests of the residents.

Note, that different rules might apply to special meetings called to remove a director, than are to be used for other business, so consult your governing documents regarding special meetings and removal of directors.

II. NOTICE OF MEETINGS

Distributing Meeting Notices

Notice of an annual or special meeting is an important procedural element of a successful meeting. How, when, and to whom notice must be given is governed by the bylaws and, for condominiums, state law. When notifying owners of a meeting, the association must follow certain rules. Notices must be issued on time and in the appropriate manner. Notices should be brief and direct.

Whom Do You Notify?

Virtually all bylaws and state statutes require the association to send a notice to each owner. This means that every owner of record must be sent notice, even if the owner is ineligible to vote at the meeting. This can also be beneficial to the collection of assessments process, as notice of a meeting is a good way to encourage all owners to clear a delinquency so that they are eligible to vote at the meeting or stand for election to the board.

Note that sending notice to all owners also means that each owner or co-owner of a unit or lot whose identity is known to the association must receive notice unless the bylaws specify otherwise.

Accordingly, if a unit or lot is owned by husband and wife or by some other group of individuals all of whom reside there, a single notice should be sent to all co-owners at the unit or lot address. If there are multiple non-resident owners, notice should be sent to each owner at the address of record with the association.

The association has the duty to keep an accurate roster of owners and their current addresses. Prudent HOA bylaws and the Condominium Act itself require owners to keep the association apprised of their identity and address, and deny the right to vote to those who do not. The association is responsible for sending notice to all persons who are listed on its roster as owners. If owners fail to receive notice because they did not notify the association of their ownership or current address, the association is not at fault. In some situations, the association must also give notice to any lender who has a mortgage on any unit or lot in the association. Usually, the bylaws or covenants will state when this is necessary.

What Address Should You Use?

Notice should always be sent to the address of the unit or lot unless the owner has specifically designated a different address of record. If mail is returned from an alternate address of record with no forwarding address, the association should ask the renter or resident for the owner's current address. If the unit is vacant or the resident will not divulge the address, the association has little choice but to send the notice to the last known address of record AND to the owner at the unit address. Keep records of returned mail.

Delivery of Notice

State statutes and association governing documents often define acceptable means of delivering official meeting notices. Delivery by first-class mail, postage prepaid, is almost always permissible. However, some older governing documents require associations to deliver notices by registered or certified mail. If so, the association should consider amending the documents to delete that provision. Realistically, certified mail delivery is less effective because many people routinely decline it. First-class mail, on the other hand, will be left in the owner's mailbox and does not require the owner to be home. Moreover, the law in every jurisdiction establishes a presumption of delivery if the notice was sent by first-class mail.

Other forms of delivery are also acceptable. Governing documents often allow the association to deliver notices by hand. Some associations prefer this method because it saves postage and seems more personal, as it gives the board members an opportunity to interact with residents. This method can pose problems, however. Postal regulations forbid the placement of anything other than official mail items bearing postage that have been delivered by the United States Postal Service in a person's mailbox. Postal regulations also prohibit posting or affixing

notices to the exterior of mailboxes or cluster boxes, although additional housing around cluster boxes may itself be used for posting notice.

Associations that hand deliver notices by placing them on the door knob, stoop, or threshold should note that even an established pattern or practice of delivering notice does not necessarily negate the effect of alleged non-delivery. Hand delivery is truly effective only if one person actually places the notice in the recipient's hand, and even then, certification of delivery may be required.

Some associations deliver notices by posting them on bulletin boards, in common hallways, on entryway doors, and in elevators. If an association has established a pattern and practice of delivering notice in this manner, that evidence would be admissible in court and most likely would be persuasive if the method of giving notice was challenged.

A few associations attempt to provide meeting notice via the association newsletter. An association that uses this method should mail the newsletter and should either put the notice on the front page or put a bold-faced statement on the front page that the meeting notice is inside. As with posting, this mode of delivery is advisable only if it is an established practice and if it is common knowledge among the owners that notice will always be made in this manner.

Electronic transmission, including email

If delivery of notice is made by any means other than by hand or through the mail, it is better to use more than one method. A notice challenge is more likely to be defeated if the association can show that notice was, for example, both posted on a bulletin board and put in the newsletter. Condominium and homeowner associations may use electronic notices if they have adopted rules for such methods, but they may only send notices electronically to those members who have agreed to receive their notices in that fashion.

Timing of Notices

State statutes and association bylaws dictate the time frame in which associations must deliver meeting notices. Any conflict between the notice period in the bylaws and the period required by statute should be resolved in favor of the statute. Thus, if the bylaws state that notice of meetings must be given no less than 10 or more than 60 days prior to the meeting, and the statute requires that notice be a minimum of 15 days prior to the meeting, the association will be obliged to give notice to the owners no less than 15 days and no more than 60 days prior to the meeting.

Most statutes and many bylaws provide only for a minimum time for notice of both annual and special meetings, although some bylaws provide a maximum time for notice of special meetings. However, the establishment of a maximum time limit can be important as well, since owners may forget the date or lose the

notice if it is delivered too far in advance. As a result, the association may fail to achieve a quorum.

The lack of a maximum time limit can also lead to an abuse of power by an incumbent administration, especially in regard to special meetings that must be called pursuant to an owner petition. For example, a group of owners files a petition requesting a special meeting to remove all of the directors because they have indicated that they will allow an important contract to automatically renew. The owners do not want the contract renewed and know that notice of termination must be given to the contractor within 45 days to prevent the automatic renewal. The board, also aware of the timing, sets the date of the special meeting for the day after automatic renewal, knowing that the bylaws do not set a maximum time limit. Because of this gap in the bylaws, the board will probably succeed in its scheme, since the owners would have to file suit to move the meeting time forward. Most likely, the contract renewal date will pass and the owners' effort to remove the directors will fail. In this instance, if there had been an outside time limit that was violated by the board, the owners might successfully challenge the contract, even after renewal.

Notice to Mortgagees

Association governing documents usually specify whether notice of an annual or special meeting must be sent to the individuals or lending institutions holding first deeds of trust on the units or lots: the mortgagees. Generally, the documents require notice to mortgagees only when they are affected by something taking place at the meeting. The most common example is a meeting that is called to vote on proposed amendments to the governing documents.

III. QUORUMS

Obtaining a Quorum

The term “quorum” refers to the minimum number of owners who must be present at a meeting, in person or by proxy, before business can be validly transacted. The number of members needed to constitute a quorum is often governed by statute. The statute will always control if it conflicts with documents provisions. The best quorum provision to insert in the documents is one that allows it to be reduced by statute and provides that a group of owners cannot try to sabotage a meeting by leaving just before a vote they think they will lose, thus rendering the vote invalid because a quorum was not present at that time. We suggest the following language:

A quorum is deemed present throughout any meeting of the Association if persons entitled to cast twenty-five percent (25%) (or such lesser percentage as may be provided by law) of the total authorized votes are present in person or by proxy at the beginning of the meeting.

Governing documents often require a majority of the votes (sometimes expressed as 51 percent) for a quorum. Most practitioners now regard that number as too high. Many statutes and newer documents allow for a lesser number of votes to constitute a quorum. The quorum should be as low as possible so that the association can conduct its business. Low quorums do not discourage high attendance, but the association must be given every opportunity to have an official meeting and conduct necessary business - even if a great percentage of owners choose not to attend.

Adjournment for Lack of Quorum

Most documents contain a procedure for adjourning a meeting due to a lack of quorum. Generally, the owners who are present in person or by proxy must obtain a majority vote to adjourn and reconvene at a later date even though the meeting was not officially constituted because a quorum was not present.

Often, restrictions state that the second meeting cannot take place within 48 hours of the adjournment so association members have time to convince others to attend. But it is not uncommon for fewer residents to attend the adjourned meeting than the first meeting. For this reason, the chairperson should ask everyone attending the first meeting to execute a proxy before leaving. Unexpected events may prevent owners who planned to attend the adjourned meeting from arriving. If the owner finds that she or he *is* able to attend after all, any proxy given is revocable by the owner's attendance at the adjourned meeting.

Failure to Achieve Quorum

Maryland condominiums and homeowners' associations should never fail to achieve quorum because the legislature has enacted provisions that enable each to hold an adjourned meeting at which the owners attending in person or by proxy automatically constitute a legal quorum despite the stated quorum provision in the governing documents.

For condominiums, Section 11-109 of the Maryland Condominium Act was revised in July of 2003 and provides that an additional (second) meeting of the council of unit owners may be called if a quorum was not present at the first meeting, so long as the following criteria are met:

- Notice of the initial meeting stated that the Section 11-109 procedures would be used if a quorum was not achieved.
- A majority of those owners present in person or by proxy vote to call for the additional meeting.
- Notice of the additional meeting is mailed to all owners at least fifteen (15) days prior to the additional meeting.

If the criteria are met, those persons who attend the additional meeting in person or by proxy, no matter how few, automatically constitute a quorum and any

business that might have been conducted at the original meeting can be conducted at the additional meeting.

NOTE: The reduced quorum provision of Section 11-109 cannot be used to reduce the number of votes necessary to amend the declaration or bylaws or to reduce the vote specified in the documents for a certain action. For example, if the bylaws require that a majority of all owners is required to approve a special assessment, that vote must still be achieved before the special assessment may be deemed to have passed.

For homeowners' associations and cooperatives, Section 5-206 of the Corporations and Associations Article, Maryland Annotated Code, makes similar provision for an additional meeting. The only difference is that notice of the additional meeting must be advertised in a newspaper of local circulation.

NOTE: Section 5-206 of the Corporations Article does not require that notice of the second meeting be mailed to homeowners'. Nonetheless, we recommend that associations send notice to all owners by mail so that they are aware of the additional meeting and can participate.

IV. CONDUCTING THE MEETING

Parliamentary Procedure

Most association documents require the board to use parliamentary procedure at annual and special meetings. Though the structure of parliamentary procedure often aids a meeting, parliamentary procedure can be overdone. Most documents that require the use of parliamentary procedure specifically refer to Robert's Rules of Order, which is available in a variety of forms and editions. Unless the documents specify a form and edition, the association should choose a version of Robert's that it likes and stick with it. This measure will provide meetings with a degree of continuity from year to year. Since associations rarely need the complicated rules that are contained in complete editions of Robert's, abbreviated editions that focus on the basics can be easier to use and understand. The purpose of parliamentary procedure is to provide structure to the meeting and to keep the meeting fair and productive.

Order of Business

Many sets of governing documents contain a specified order of business to be followed at the annual meeting (and, sometimes, at special meetings). The annual meeting order of business called for in these documents is often similar to the one that follows:

- Call to Order
- Roll Call (usually obviated by the check-in process)
- Verification of Quorum

- Proof of Notice (of Meeting)
- Reading and Approval of the Minutes of the Previous Meeting
- Report of the President
- Report of the Treasurer
- Reports of Other Officers
- Committee Reports
- Old Business
- New Business
- Appointment of Inspectors of Election
- Candidate Forum
- Election

Adjournment

If the order of business is set by the bylaws, most associations choose to follow it to the letter. However, there are sometimes two circumstances when following this order of business detracts from the efficiency and brevity of the meeting:

(1) when the calculation of a quorum is complicated and takes quite some time, and (2) waiting for the counting of votes and the announcement of election results. The first problem is easily resolved by the president or other officers going out of order and making their reports while quorum is being tabulated. It is a simple matter to inform the owners that the reports are being made in the hope that a quorum will be had and the meeting can later be officially opened. Because the meeting cannot be officially opened until a quorum is confirmed, it is not appropriate to entertain a motion to revise the order of business, but the reports can be made on an unofficial basis and then later adopted by the body as the official reports once the meeting is opened. If the meeting cannot be opened for lack of quorum, those present will have had the benefit of receiving valuable information and no harm is done.

Because calculating the results of an election can also take some time, it may be appropriate to entertain a motion to revise the order of business by moving the election up so that it is conducted before reports and other routine business. Having done so, the results can be calculated while other business is being conducted so that the winners can be announced before the meeting concludes. The only potential problem with this change in order of business can come when the body knows that a controversial issue will be brought up under old or new business. In that event, it may be difficult to get volunteers to count votes and act as inspectors of election because they want to be present for the discussion on the hot topic. Of course, that need can also be accommodated by being flexible and only allowing the reports to be made and business other than the hot topic to be discussed during the counting of votes, reserving discussion on the hot topic until after all are again present.

The order of business for special meetings is typically:

- Call to Order
- Roll Call (usually obviated by the check-in process)
- Verification of Quorum
- Proof of Notice (of Meeting)
- Business Called for in the Notice of Meeting
- Adjournment

V. ELECTIONS

Organizing an Election

Conducting the election itself should be a simple matter, and there is no need to complicate it with undue procedures or embellishments. It is a good idea to conduct the election as early in the meeting as possible so the results can be tabulated as the meeting progresses. It also can be politic to do so because some meetings seem to ferment until the election occurs, especially if the election is hotly contested. If the documents set an agenda where the election occurs last, it is easy enough to entertain a motion to revise the agenda.

The CCOC offers a packet of forms and checklists on its website called “How to Conduct an Election” which can help those who are not familiar with the process. The forms can be modified to suit each association’s particular requirements.

Sometimes there is confusion over whom the members are actually going to elect: officers or directors? Almost all association documents allow the members to elect the directors who sit on the board. The board, not the members, will elect its officers (president, vice-president, secretary and treasurer) at its first meeting after the election of directors.

Candidate Forum

It is important that all candidates for the board of directors have an opportunity to meet the owners and tell them their qualifications and platforms. Unfortunately, most governing documents are completely silent on this issue. It then becomes incumbent upon the current board of directors to set candidate forum rules for the election.

Some associations go so far as to have one or more candidate forum meetings before the annual meeting at which the candidates get a specified amount of time to make a presentation and the owners then have a question and answer period in which to further explore the candidates' qualifications and philosophies. Many associations publish candidate resumes prior to the annual meeting. However, even if all of these methods are employed, some version of the candidate forum should also be conducted at the time of the election so that voters not attending

other meetings or reviewing the written materials will have some minimal introduction to the candidates. Speaking time limits and question and answer period time limits should be set before the meeting and announced at the beginning of the forum.

Unless specified in the documents, there is no right or wrong way to conduct a candidate forum: the important thing is to foster communication between the owners and the candidates so that the owners have an opportunity to elect those who best represent their viewpoints.

Inspectors of Election

Many documents call for the appointment of inspectors of election from the owners present at the meeting. Even if the documents do not require such inspectors, it can be prudent for the chairperson to appoint them so the election can be certified as legitimate. Three people should be appointed, and at least one of them should be from the opposition if the group is divided into factions.

Naturally, no one should be an inspector who has an interest in the election results, such as candidates, candidates' spouses, current officers, or directors. The inspectors should be neutral and fair.

Inspectors can be given the task of merely observing, or they can help with the process. In some associations, the inspectors conduct the entire ballot collection and vote tabulation process. The chairperson should describe the inspectors' function in detail at the meeting before making appointments. The inspectors should be required to certify, by signature, that the election was conducted fairly and that the results were accurate. The election results and the inspectors' certification should be kept among the association records for at least three years.

Taking the Vote

The next step is taking the vote. Attendees should be given ample time to mark their ballots and fold or seal them for collection. Some associations have the inspectors take the ballots from each person or from the person at the end of each row. Others require voters to deposit ballots in a ballot box, which is passed around or found at a particular location. The process should be quick and the security of the ballots should be protected, especially if it is a secret vote.

Tabulating the Vote

Several methods of vote tabulation are available to associations. These methods range from basic computation by hand, to sophisticated calculators, to computerized tabulation using barcodes. The League of Women Voters will, for a contribution, attend the meeting, count ballots and proxies, and certify results. No method is right or wrong. All that matters is that the vote is accurately counted.

The association should set procedures beforehand and make sure the

individuals involved understand their tasks no matter what method it uses. Advance preparation is needed to ensure accuracy and to project the people involved as effectual. It also can be important to have tally sheets prepared in a format similar to that used for counting.

More than one person should be involved in the counting, and the job should be split among each person. For example, one person could be assigned all of the proxies and ballots that are filed by owners with a certain percentage interest. Once the number of votes for each candidate is determined, that total need only be multiplied by the percentage interest of that category. These totals are then recorded on the prepared tally sheet for that percentage interest and given to the person who will receive all of the tally sheets for each percentage interest. It is then a simple matter of adding the subtotals from each percentage interest to determine the total vote for each candidate.

Contemporary computer technology offers associations new and interesting ways to tabulate election results. Some companies will, for a fee, bar code all ballots and proxies. Associations that use this method will have election results available within minutes of the vote.

Software packages are now available that allow associations and management companies to provide identical services. One need only purchase the software, load it on a PC-compatible computer, and rent or buy a bar-code reader (or enter coded information by hand). This technology is a great time-saver and allows associations to achieve a new level of accuracy.

Montgomery County Code

Sec. 10B-17. Voting procedures.

(a) Election dates and procedures.

Not less than 10 nor more than 90 days before an election for the governing body of an association, the governing body must notify all members of the association of election procedures and the date of the election. An initial election for the governing body must be held not later than 60 days after the date that 50 percent of the units have been conveyed by the developer to the initial purchasers.

(b) Election materials. All election materials prepared with funds of the association:

- (1) must list candidates in alphabetical order; and**
- (2) must not suggest a preference among candidates.**

(c) Absentee ballots. Any unsigned absentee ballot, to be valid, must be:

- (1) received in a signed, sealed envelope, bearing the identification of the dwelling unit and proportional voting percent, if any, on the outside; and**
- (2) opened only at a meeting at which all candidates or their delegates have a reasonable opportunity to attend.**

(d) Proxy or power of attorney. Any proxy or power of attorney valid under state law may be used at any association meeting. However, a proxy and any power of attorney created for the purpose of a governing body's election must be appointed only to meet a quorum or to vote on matters other than an election for a governing body unless the proxy or power of attorney contains a directed vote on the election. If a proxy or power

of attorney form must be approved before it is cast, the approving authority must not unreasonably withhold its consent. A general power of attorney valid under state law may be used for any purpose at an association meeting that is consistent with the provisions of the general power of attorney, including for an election of the governing body.

(e) Cumulative voting prohibited. In an election for a governing body, for each unit that a member owns the member must not cast more than one vote for each candidate.

(f) Counting votes. Until the time for voting closes, an association must not open or count election ballots.

(g) Terms of office. Unless the association documents provide for other terms of office:

(1) a member elected to the governing body of an association is elected for a term of two 2 years; and

(2) the individual terms of the entire governing body are staggered, so that as close to one third as possible are elected each year.

Majority or Plurality

In many elections, especially those where there are more candidates than open positions, candidates with the highest number of votes may not earn the majority of the votes. Such a result will not create problems for an association if its documents provide that the candidate with the greatest number of votes (the plurality) will win the election. If the documents are silent on this issue, and state that all issues arising at the meeting should be decided by a majority, the association may face a question about how many votes a candidate needs to be elected.

If an association adopts a conservative interpretation that requires a candidate to earn a majority vote to be elected, it may need to hold an indeterminate number of run-off elections before all positions are filled. For example, if there are five candidates for three positions and the candidates receive 42, 27, 15, 11, and 5 percent of the vote, respectively, none of them have been elected. The association would then be required to drop the lowest candidate and try again. This might happen several times before three candidates are elected by majority vote.

It is better to view the election as the main issue. As long as the election is decided by a majority vote, candidates should be elected based upon those receiving the greatest number of votes even if that is a plurality. It is difficult to conceive that association developers or their attorneys ever intended to saddle associations with the cumbersome process that a true majority vote requirement would entail. An association with documentary language that requires a majority vote should ask its attorney for a formal opinion letter regarding the actual vote necessary for each successful candidate.

Election Materials

Associations should never favor a particular candidate when preparing election materials with association funds. **Chapter 10B of the Montgomery County Code requires all associations to list candidates alphabetically and to**

show no preference. Though this rule seems simple, many may wonder if the indication that a candidate is an incumbent is a statement of preference. From a practical standpoint, being an incumbent may be an asset or a liability, depending upon how the current administration is regarded by the voter. The best bet is to not indicate incumbency. Most owners are going to know who is an incumbent. It should be left to the candidates whether or not to emphasize their incumbency in the candidate forum or in prepared written materials.

Voting by Ballot

All votes except those on minor or procedural issues should be recorded on a written ballot. A written ballot allows for continuity, as the vote of those owners filing directed proxies will be in writing. The ballot also safeguards the integrity of the vote, as a permanent record is available if the vote is challenged. Keep ballots for at least one year or, preferably, for three years.

A written ballot also can have a positive psychological effect. People seem to feel like they are doing something positive and official when casting ballots, as opposed to merely raising their hands. Filling out a ballot also makes people feel like the association is being efficiently run or managed. Moreover, putting their vote in writing usually makes people reflect or deliberate on their choice a little longer.

Secret Ballot

Many associations have either a tradition or a requirement to hold all votes in confidence. Implementing a procedural system that ensures the secrecy of a vote is not difficult, but it requires planning. A secret vote must be done by written instrument: it is impossible to keep one's position private if the vote is taken by a show of hands or by ayes and nays. The simplest system for those who will be voting in person or by proxy is to distribute ballots at the registration table. It is easy to check voters in, verify their status, and give them a blank ballot that is marked with the percentage interest of their vote. Then the voters merely place the ballot in the ballot box after voting. The ballot only contains the percentage interest voted and the vote itself, not the name and address of the owner.

If the secret vote includes mail-in votes, either directed proxies or absentee ballots, the best system involves dual envelopes. The ballot or proxy stating the percentage interest is mailed to the owner along with two envelopes. One envelope is used as the outer envelope and the other as the inner envelope. Owners cast their vote on the form and place it in the inner envelope, which is blank. That envelope is placed in the outer envelope, which contains the owners name and the unit or lot number. The package is mailed or put into a ballot box located on the property. The outer envelope is used for registration purposes, then opened, emptied, and discarded. The inner envelope is placed in the ballot box for counting at the same time that the ballots of those at the meeting in person are counted. As long as the outer and inner envelopes are separated as described

and no identifiers are on the ballot or proxy, secrecy will be maintained.

Ballot Form and Content

The ballot form need not be any more complicated than the proxy form. It only needs to set forth clearly what or whom the owners are voting for or against.

Election Records

The ballots, proxies and tabulation sheets used during the election are the official election records of the association. These records should be maintained by the association for the longest term granted in the election. So, for example, if one or more directors were elected for a three-year term, the records should be kept for three years. If the entire board is elected each year for a one-year term, records need only be kept for that year.

Because the board of directors conducts virtually all of the business of the association, the integrity of an election is extremely important. Any director seated in error is not properly elected, and any decisions of a board containing one or more such directors are subject to challenge. For this reason, all elections should be conducted in strict accordance with the governing documents and Maryland law and records verifying the results should be kept in order to answer any challenge.

VI. PROXIES

Voting by Proxy

A proxy is the written authorization that allows one person to appoint another to vote on his or her behalf. The term "proxy" refers to the written instrument, while "proxy holder" refers to the person who is designated to vote for another at an annual or special meeting. The "proxy giver" is the person who authorizes another to vote on his or her behalf. The use of proxies in community associations is usually determined by Maryland law, the association's governing documents, or both.

General Proxies

The most common type of proxy used in community associations is the general proxy. A general proxy allows the holder to vote as s/he wishes at a meeting. Blanket general proxies allow the holder to vote on any matter that comes before the owners during the life of the proxy. If the proxy giver executes a general proxy, the proxy holder is authorized to vote as if he or she were the proxy giver.

Directed Proxies

Directed proxies bind the proxy holder to specific terms, allowing the proxy giver to control the vote. The directed proxy is, in effect, an absentee ballot, which

means that the proxy holder is little more than a courier who is entrusted with recording a vote. **Chapter 10B of the Montgomery County Code requires all associations to use directed proxies for the election of directors. If the proxy ballot is not directed, the Code states it may be used only to help establish a quorum and for other business of the meeting, but not for the election of directors. (see 10B-17 pg. 35-36)**

Other Proxy Limitations

The right to vote by proxy relates to the right of an individual to vote. Statutes do not guarantee anyone the right to be a proxy holder. Accordingly, limitations placed on the proxy holder cannot abridge any right. However, Chapter 10B of the Montgomery County Code states that a board must have a good reason to reject any proxy ballot.

Limiting the number of proxies that any single individual may hold can thwart the assertive person who otherwise would show up at the meeting with the election in the bag. Such a limitation should include board members and management. Unfortunately, these individuals often are allowed an unlimited number of proxy votes because policy drafters assume they will vote in a neutral manner. It is quite common for proxy holders to be limited to other owners. It makes sense that the proxy, especially if it is a general proxy, can be voted only by someone who has the same interest in the property as the proxy giver. By the same token, outsiders would normally have little interest in the association's affairs and little knowledge upon which to base intelligent decisions. This limitation, then, also increases the integrity of an election or vote. Some associations allow tenants and mortgagees to vote by proxy. Each of these parties should be concerned, for example, to see that the association is managed well and to vote accordingly. The interest of tenants and mortgagees is recognized by law in some jurisdictions. For example, in Maryland, time limits placed on proxies may be waived when the holder is a tenant or a mortgagee (the lender holding the mortgage on the unit or lot).

The association secretary may be the repository for proxies that are cast by the proxy giver or that are used only to establish quorum. The secretary is normally responsible for controlling the associations books and records, receiving mail and service of process, and certifying votes or elections. The owners should be able to rely upon the integrity of the secretary and of the office to carry out this task.

Proxy Form and Content

Some governing documents contain specific requirements for proxy form and content. Most, however, are silent, as are the Condominium Act and the Homeowners' Association Act. A proxy need not be a sophisticated legal instrument full of incomprehensible language. The purpose of a proxy is to assign a vote from one person to another. It is sufficient, then, if the instrument identifies the proxy giver (and his or her unit or lot, if required), the proxy

holder, the meeting or vote for which the assignment is intended (including the date, time, and place, if necessary), the date of the proxy, and the signature of the proxy giver. **If the proxy is to be used to vote in an election, it should also list the names of all known candidates in alphabetical order.** If a witness or notarization is required, those blanks must be provided. If the proxy is directed, the information and blanks necessary for the proxy givers to direct their vote must be provided. It may be necessary to provide written instructions for proper execution of the proxy. These instructions can be included either on the proxy form or on a separate sheet.

The Commission has ruled that under the “open records” sections of the HOA and Condominium Acts, members can inspect ballots after an election. Therefore, we recommend that in order to preserve voter secrecy, the proxy form be in two sections: one part will contain the identifying information of the proxy giver, and the other part will state how the proxy is to be voted. The election judge will separate the two parts at the election, and cast the ballot part with the other ballots. Both parts, however, should be kept (separately) as part of the records of the election. Alternatively, the association can use the dual envelope method described in the section above on “Secret Ballots.”

VII. BOARD MEETINGS

Notice of Board Meetings

Meetings of the board of directors are official meetings of the association and must be treated accordingly. In fact, more official business of the association occurs at board meetings than at owner meetings. This is so because most of the powers and duties of the association are specifically delegated to the board in the governing documents. Typically, the only powers reserved to the owners are the powers to elect and remove directors, amend the governing documents and, sometimes, approve special assessments. Otherwise, the board is tasked with maintaining the property, hiring and firing personnel and contractors, keeping the books and records, developing and enforcing rules, preparing the budget and setting the annual assessment, formulating policies and procedures, and complying with local, state and federal laws, ordinances and regulations. Except for emergencies, all of these things are done by the board at its meetings.

The nature and timing of the notice to board members is usually controlled by the documents or Maryland law. Many older documents require that notice be delivered via U.S. Mail three to five days before the meeting. Others are more flexible, allowing the board members to determine for themselves how and when they should receive notice. Many boards set the date for the next meeting before adjourning the current one, thereby giving all present notice at that time. Many others set regular monthly meetings for the same place, day and time (third Tuesday, 7:00 P.M., at the clubhouse) so that it is only necessary to give notice of regular board meetings once a year.

Whatever method is employed (including email, facsimile and telephone), the form of the notice must be permitted under the documents and each director must receive notice in a timely manner. If no method or time is set by the documents or statute, the board should set its own policy so that there can be no dispute concerning whether notice was properly made.

Maryland now has what is generally known as a "sunshine" law, a law that requires board meetings to be open to all members of the association unless the subject matter of the meeting falls within certain categories for which closed or "executive session" meetings can be held (*see pg. 44*). A meeting cannot be deemed open to the owners unless they have notice, but the statute and many documents are silent as to how and when notice of board meetings must be given to them. If so, owners should receive the same notice as directors. Because giving monthly notice to all owners can be time consuming and costly, many associations have opted for one annual notice of pre-set monthly board meetings.

If board meetings are not pre-set, then owners will have to be given notice each month. This can be done by mailing notice to each owner in a timely fashion or by newsletter or by posting on a bulletin board or other location, or by hand delivery. Email delivery is not appropriate unless the board can verify an email address for each owner. The same is true for posting on a web site. Until such time as the vagaries of electronic communication are a thing of the past, the best and most challenge-proof method of delivery is via the mail.

Quorum

A majority of all the directors is usually the number that must be present in order for there to be a quorum and the meeting officially called to order. If less than a majority is there, no official business can be conducted (meaning that no binding decisions of the board can there be made). Unlike the quorum provision cited above for annual meetings, the departure of enough directors to diminish quorum DOES effectively adjourn the meeting, as no further business can then be conducted.

Board members can participate in meetings even though they are not physically present, so long as they are present in some other fashion, such as by speaker phone, that allows them to hear everything being said and allows everyone present to hear everything the absent member has to say. We recommend that if associations allow such a procedure, they adopt written rules on it so that all members are aware of them and have equal opportunity to take advantage of them. The minutes of the meeting should make clear how the absent member participated.

Deciding Questions

All decisions of the board must be by majority vote, but the term "majority vote" is usually based upon the number of directors actually present so long as a quorum is present. Thus, if there are three directors on a five-person board present at the meeting, official decisions of the entire board of directors can be made by two of

those directors present. As noted above, the proviso in Robert's Rules of Order stating that the president or chairperson should only vote to break a tie is not applicable to community associations. Each director is elected to represent the owners and to vote on issues as he or she sees fit. This is part of every director's fiduciary obligation to the owners and the association. If the president or chairperson is also a director, then he or she must vote - as a director - on every matter that comes before the board. His or her election by other directors to serve as president or chairperson does not supersede the obligation to the owners.

Similarly, if the president or chairperson wished to make a motion, he or she should do so as a director. To be procedurally correct under Robert's, he or she should first step down as presiding officer long enough to make the motion, then resume the gavel and preside over discussion and vote.

Association documents often allow the board to elect as officers people who are not members of the board. For example the board may want a professional manager or accountant to act as its treasurer. Officers who are not also directors cannot vote. Only directors can vote.

Proxies

Unless there is a VERY specific authorization in the documents or in applicable statutory law, board members may NOT vote by proxy. The reason for this is that each director is elected in his or her *personal* capacity to serve as director and vote on behalf of all other constituent owners. By accepting this obligation, the director is effectively already voting for that constituency as their proxy holder. That proxy could not be further assigned without the consent of every member of the constituency. Accordingly, directors who cannot attend a meeting suffer the same fate as our Senators and Representatives in Congress who cannot attend a session: their votes are not counted.

Ballots

Few documents or statutes specifically provide for a written ballot of directors at a meeting of the board of directors. As a practical matter, it is much faster for a verbal vote to be taken and recorded in the minutes of the meeting, so most boards conduct business in that fashion. However, there are times and circumstances where a secret written ballot of directors might be appropriate. For example, the election or removal of officers might best be handled that way so that there is no acrimony among directors concerning those issues. A board wishing to take some votes by written ballot may wish to establish procedures and rules regarding the process and when it will be used.

Agendas

Some rules of order state that the president or chairperson sets the agenda. Obviously, the person setting the agenda controls the meeting, although a preliminary motion at the meeting should be the approval of the agenda, in

which case others may have input at that time. In many associations, it is the manager who sets the agenda, as he or she is the person most familiar with the business of the board which must be conducted at the meeting. Some boards allow any director to add items to the agenda at the beginning of the meeting. Because many extraneous matters arise at association board meetings, it is important to have an agenda - and one that is as specific as possible - so that all necessary business is conducted without those other matters interfering. Some boards make very effective use of a timed agenda, understanding that all necessary business should be fitted into a two-hour meeting time, as the attention of members is less focused after two hours.

Although board members must follow the agenda, and although the agenda may be set by the president or manager, they are not excluded from being able to raise the issues they think important. This can be done during the time set aside in the agenda for "new business." At that time the concerned director can state the issue and ask that it be placed on the agenda for the next meeting for discussion and if possible a vote.

Member Comments and Open Forums

The Condominium and Homeowners' Association Acts state that members of associations have the right to speak at open board meetings on any issue that is listed on the agenda. However, the board can set reasonable limitations on this right, such as limiting each speaker to a few minutes.

Although the sunshine (or "open meetings") laws in effect in Maryland specifically require that all owners be notified of all board meetings, the presence of owners at a meeting can often be disruptive - even to the extent that necessary business is not conducted. Although the sunshine laws do not give the owners the right to be heard at the meeting, prudent boards find it politic to provide a time period during which owners can make general comments. It is best if this "open forum" occurs at the beginning of the meeting both so that owners can raise issues they would like the board to consider and because many owners will not be disruptive once they have been heard or their issue has been dealt with by the board.

The open forum should have a finite time limit. If there are a great number of owners who wish to address the board, it is advisable to set speaking time limits, and not to allow anyone to speak twice until everyone has had an opportunity to speak once.

At the conclusion of the open forum, the board should make it clear that the remainder of the meeting is the business meeting of the board and that owners will no longer be recognized or allowed to speak. It can sometimes have a great psychological impact on the owners if a couple of directors move around the board table so that their backs are to the audience. Doing so says that the board is meeting to discuss business, that the members are focused on each other (not the

owners) and that the role of the audience has changed and is now merely one of observers, not participants.

An important note: the “open meetings” statutes applicable to community associations are NOT identical to the Maryland Open Meetings Act, which is much more detailed and which applies only to government agencies.

Executive Session

The Condominium Act (Section 11-109.1), the HOA Act (Section 11B-111), and the Cooperative Housing Act (Section 5-6B-19) set specific criteria under which a meeting of the board of directors may be held in closed or "executive" session. These criteria are:

- **Discussion of matters pertaining to employees and personnel.**
- **Protection of the privacy or reputation of individuals in matters not related to the association's business.**
- **Consultation with legal counsel.**
- **Consultation with staff personnel, consultants, attorneys, or other persons in connection with pending or potential litigation.**
- **Investigative proceedings concerning possible or actual criminal misconduct.**
- **Compliance with a specific constitutional, statutory or judicially imposed requirement protecting particular proceedings or matters from public disclosure.**
- **Discussions of individual member's assessment accounts.**
- **Consideration of the terms or conditions of a business transaction in the negotiation stage if the disclosure could adversely affect the economic interests of the association.**

If a board closes a meeting, the minutes must show the reason that the meeting was closed and how the board members voted on the motion to close it.

Although the board can close its meetings, it cannot conceal the decisions it makes at any such meeting; and at its next open meeting it should report all decisions it made at the closed meeting.

The Chairperson

The key to a well-run meeting is a chairperson who acts with quiet authority and has good people skills. The chairperson must always be in charge and in control of the meeting, but he or she should not be overbearing, confrontational, dictatorial, inflexible or always requiring center stage. Indeed, the chairperson must frequently walk a tightrope, intervening enough to keep the meeting on track but allowing others to participate as appropriate so that the business of the board gets done.

It is crucial to the conduct of any meeting that the chairperson remain above the fray and that he or she be composed, organized, soft-spoken, equitable, and obviously in charge without being overbearing. This is a tall order to fill, especially if the chairperson comes under personal attack. If the person who would normally chair the meeting is incapable of this demeanor, or if he or she feels some things might occur that will cause a loss of composure, that person should put aside custom or ego and allow someone else to chair the meeting. Once the chairperson becomes visibly angry, tearful, flustered, or frustrated, the meeting can degenerate. Similarly, a chairperson who is overbearing, confrontational, dictatorial, inflexible and egotistic will usually cause resentment such that all goodwill is lost.

Though the chairperson is in charge of the meeting, he or she should not ride roughshod over the members. The chair can diffuse anger and deflect personal attacks by the judicious use of advisors - such as management or legal counsel - or of experts - such as architects, engineers, and accountants. The success of the meeting may depend upon the presence of the right advisors or experts depending upon the issues that are likely to arise. The chairperson should also make good use of committee chairs, officers, and directors who can answer questions or explain issues or actions. The meeting need not and should not be a one-man or one-woman show.

At the same time, the chairperson cannot allow others to take over the meeting. He or she should see that specific assignments are carried out by those mentioned above, but that control of the meeting returns to the chairperson after each report or discussion. In fact, one sign of a good chairperson is that all heads automatically turn to him or her at the end of a report by another.

Note: the chairperson should not allow discussion of an issue to continue interminably. When discussion becomes tentative, repetitive or meandering, the chairperson should ask "Are we ready for the question?" This language is better than "Is there any more discussion?" because that language can foster the continuation of what the chairperson has already perceived as fruitless dialog.

Minutes of the Meeting

The minutes of the board meeting (and of the annual meeting) are the "official" record of what occurred at that meeting because they have been subsequently reviewed by the board (or the owners) and their content approved. This means that, prior to such approval, the minutes are not "official" and thus are not yet records of the association and should not be distributed. This can sometimes cause a delay in making the minutes available to the owners. For example, the minutes from the January meeting are reviewed by the board at the February meeting, but extensive changes are required because the recording secretary failed to include the discussions and decisions made during an entire section of the meeting. In that situation, the minutes are sent back to be rewritten pursuant to the board's direction at the February meeting, but are then not available for review and approval until the March meeting. This means

that the "official" minutes of the January meeting are not available to the owners until March - which is a problem for a board that wishes to keep communication lines open with the owners.

One method of resolving the communication problem (an issue crucial in all associations), while still protecting the integrity of the association's official records, is for the board to agree upon a synopsis of the meeting at its conclusion. This synopsis might be nothing more than a short list of issues discussed and actions taken. Once approved, the synopsis can be published to the owners so that they are aware of how hard the board is working on their behalf. The synopsis can also be a vehicle for important announcements. For example, the synopsis might indicate that the board approved a contract to re-stripe the parking lots, and give the owners notice that all cars must be off the lots by 8:00 am on a certain day.

Once the minutes become official, any notes of the meeting from which the minutes were derived as well as any tape recording of the meeting that may have been used to create notes or the minutes should be destroyed. This is so because notes and audiotapes may contain extraneous or even incorrect information that was later changed in the minute approval process. Also, an audiotape will not reflect gestures or facial expressions that might change the meaning of the words recorded and thus give a listener who was not at the meeting a false impression of the actual events at the meeting. For the same reason, boards might adopt a policy preventing owners from taping meetings of the board or annual and special meetings of the owners.

Whether to allow voice or video recordings of a board meeting is becoming a more frequent issue in associations because of the growing popularity of laptops, video cameras, and other devices. The board may occasionally wish to review its policies on the topic so that they reflect the input and desires of the community.

Content of Minutes

Minutes should contain all information necessary to make them an accurate record of the meeting, but should be as brief and to the point as possible. For example, it is sufficient to say "The board discussed several bids for landscaping services and selected ABC Landscaping as the contractor for the coming year by unanimous vote." There is no need to provide specific detail of the discussion, even if it took an hour of the board meeting to accomplish. There is also no need to recite the vote of each director if the vote was unanimous. However, when a decision is made with dissenting votes by some directors, it is important to record the fact of the dissenting votes and, upon the request of those directors, the basis or reasons for their dissent. Similarly, management may wish the minutes to reflect a recommendation made by it that was not followed by the board.

Some decisions may be challenged by members later on the grounds that the board acted arbitrarily or without a good reason. Although we have said above that the minutes need not contain the details of discussions leading up to votes, it may be

helpful for the minutes to note the reasons given for the decision, or to refer to the memoranda or reports used by the board in its discussions. By doing so, the board is in a better position to justify its decisions when challenged months or even years later.

Policies and Procedures Manual

Although the minutes of board meetings are the official record of those meetings, they are a cumbersome vehicle for locating the important policy resolutions of the board or specific procedural processes adopted by the board. This is so because the minutes contain a lot of other important, but routine, information. Any board member or manager who has tried to wade through years of board meeting minutes to find out if the board had a specific policy concerning, say, fining, knows what a difficult job it is.

The policies and procedures adopted a decade ago by the board at that time remain the policies and procedures of the association until modified or repealed by a future board. The "board" is a single, continuous legal entity just like the association. The directors who comprise the board change from time to time, but each set of directors has a legal responsibility either to follow the policies and procedures of the board or to change them. It is difficult to follow these policies and procedures unless you know what they are. It is for this reason that all associations should make it a practice to put all policies and procedures in writing and to keep them separate from the minutes.

Statement of Board Member Ethics and Conduct

It will increase member respect for, and trust in, their Board of Directors if they know that the Board is committed to acting fairly and in the association's best interests. Likewise, it helps commit the Board to recognizing the principles of proper governance. We therefore recommend that every time a board is elected, its members sign a code of conduct, and we suggest the board use one of these forms.

[DRAFT] CODE OF CONDUCT FOR BOARD MEMBERS

The _____ Board of Directors has approved the following code of conduct for its members in order to ensure that they maintain a high standard of ethical conduct in the performance of the business, and to ensure that the residents maintain confidence in and respect for the entire Board.

The following principles and guidelines constitute the code of conduct:

No individual shall use his/her position as a Board member for private gain, for example:

No Board member shall solicit or accept, directly or indirectly, any gifts, gratuity, favor, entertainment, loan, or any other thing of monetary value from a person or firm who is seeking to obtain contractual or other business or financial relations with [name of association].

No Board member shall accept a gift or favor made with intent of influencing decision or action on any official matter.

No Board member shall receive any compensation from the Association or any third party for acting as such.

No Board member shall engage in any writing, publishing, or speech making that defames any other member of the _____ Board or resident of the community.

No Board member will willingly misrepresent facts to the residents of the community for the sole purpose of advancing a personal cause or influencing the community to place pressure on the Board to advance a Board member's personal cause.

No Board member nor his/her agent or employee or family member shall enter into

a personal service contract with the _____ without previous disclosure of such interest to the Board.

No Board member will seek to have a contract implemented that has not been duly approved by the Board.

No Board member will interfere with a contractor implementing a contract in progress. All communications with contractors will go through _____ site staff or management or be in accordance with policy.

No Board member will interfere with the system of management established by the Board and the management company.

No Board member will interfere with the duties of any staff member of the _____.

No Board member will harass, threaten, or attempt through any means to control or instill fear in a member of the staff.

No Board member will utilize homeowners' keys in any manner other than as outlined in the Key Policy passed by the Board of Directors on January _____, 20____.

Any Board member who violates this code of conduct agrees that the Board of Directors may seek injunctive relief against him/her and agrees to pay the attorney fees incurred by the Board in that enforcement effort. The Board member also agrees that the Board shall be relieved of posting bond as a condition to its injunctive remedy.

No provision of this Agreement can be rescinded, altered, and/or amended without unanimous vote of the members of the Board of Directors.

Signed:

President _____ Date

Vice President _____ Date

Secretary _____ Date

Treasurer _____ Date

Board Member _____ Date

[DRAFT] CODE OF ETHICS AND RULES OF CONDUCT FOR VOLUNTEER BOARD MEMBERS, OFFICERS, AND COMMITTEE MEMBERS

WHEREAS, the Board of Directors of [name of association] has the power and the responsibility to make decisions for the entire community, and

WHEREAS, the Board of Directors is responsible to appoint officers and committee members, and

WHEREAS, the volunteer leaders of the Association are responsible to set a standard and a tone for behavior that is conducive to the best interests of the entire community,

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Directors of _____ hereby adopts the following rules of conduct, standards of behavior, ethical rules, and enforcement procedures that are applicable to all volunteers serving the community:

1. The Board of Directors will use its best efforts at all times to make decisions that are consistent with high principles, and to protect and enhance the safety and property value of the residents.
2. No gifts of any type worth \$5.00 or more will be accepted from any resident, contractor, or supplier.
3. No contributions will be made to any political parties or political candidates by the Association.
4. Confidentiality of other Board members' personal lives, all residents' personal lives as well as employees' personal lives, will be protected by the Board officers and committee members.
5. No interference between the Board of Directors or other volunteers and the employees will be undertaken, so long as a contract exists with a management company which prohibits such interference.
6. No promise of anything not approved by the Board as a whole can be made to any subcontractor, supplier, or contractor during negotiations.
7. No drugs, alcohol, or substance abuse will be tolerated.
8. Any Board member convicted of a felony will voluntarily resign from his/her position.
9. Board members will immediately remove any volunteer from such positions as officers or committee positions if said person has been convicted of a felony.
10. Any Board member under investigation for a felony will request a leave of absence from the Board of Directors during the investigation and trial period.
11. Language at Board meetings will be kept professional. Personal attacks against owners, residents, officers, and directors are prohibited and are not consistent with the best interests of the community.

12. It is understood that differences of opinion will exist. They should be expressed in a clear and business-like fashion.
13. Proper parliamentary procedure should be followed to have such dissenting positions stated clearly within the official records of the Association.
14. A volunteer may not knowingly misrepresent any facts to anyone involved in anything with the community which would benefit himself/herself in any way.
15. No volunteer serving the community may use his/her position to enhance his/her financial status through the use of certain contractors or suppliers. Any potential conflict of interest must be exposed to the other volunteers, especially to the Board of Directors.
16. The Board of Directors will stand and face the community at their first Board Meeting following their Annual Meeting and will raise their hands and agree to abide by this Code of Ethics and will sign the Code of Ethics.
17. This resolution of Rules of Conduct will be framed and kept posted in the Association's office. Each new volunteer will be given a certificate and will be asked to initial that they have received the certificate and have read it and agree to abide by it.
18. Violations of the Code of Ethics will be brought to the Hearing Board.
19. The attorney, management agent, and accountant, if any, for the association can serve as Advisory Hearing Board members if requested by the Hearing Board.

The resolution is adopted this _____ day of , 20__ at an open Board meeting where a quorum of the Board was present and will become effective immediately.

Signed:

President _____ Date

Secretary _____ Date

CHAPTER 4

EMPLOYEE HIRING AND FIRING: RULES TO REMEMBER

Condominiums, cooperatives and homeowners' associations, particularly large ones, often hire employees or retain independent contractors to perform some of the association's responsibilities. Every such employer faces legal and practical risks whenever a new employee is hired and when an unsatisfactory employee is fired. It is impossible to eliminate all risks, but a careful employer can reduce the likelihood of lawsuits and other problems arising from hiring and firing. The following rules should help:

I. HIRING

Clearly define the job

Prepare a detailed job description, listing the responsibilities of the position and the tasks to be performed. It is best to try and define specific accountabilities and timeframes for the position.

In preparing to review applicants, think about the knowledge, skills and other qualifications necessary to meet the requirements of the job description.

Carefully review resumes and applications

Consider the following:

- Is the applicant's experience relevant to the job?
- Are there unexplained gaps in employment history?
- Has the applicant changed jobs frequently?
- Does the resume reflect the applicant's attention to detail (or lack thereof)?
- If the job requires verbal, writing, typing or clerical skills, how are those reflected in the resume? Request samples of work product, if possible.
- When possible, have applicants interviewed by more than one person.

Make the most of the interview, but avoid certain questions and topics of discussion

DO NOT ask about the following, and be careful about discussions that raise related issues:

- race, sex, religion, national origin, or age, except that a person may be

- asked whether he or she is at least 18 years of age;
- marital status;
- number or ages of dependents;
- maiden name;
- pregnancy, childbearing or family responsibilities;
- type of discharge from the military service;
- general medical condition, state of health or prior illnesses;
- physical or mental handicaps, **except** that, after explaining the essential functions of the job, the employer may ask generally whether the applicant has any restrictions that may interfere with his/her ability to perform the job;
- height or weight;
- whether an applicant ever has filed a claim for workers' compensation;
- assets, liabilities, or credit history, including bankruptcies or garnishments;
- whether an applicant ever has been arrested;
- union membership or preferences;
- whether the applicant would be willing to take a lie detector test.

II. FIRING

All rules and policies, including discipline and termination procedures, should be written down in a manual, and each employee should be required to sign an acknowledgment that he/she has received a copy. Make sure that the employee manual clearly explains the grounds on which an employee may be fired. Every employee should know what a "firing offense" is.

Except in extreme circumstances (e.g., an employee stealing, or committing some other serious misconduct), a graduated disciplinary process should be followed. When an employee breaks a rule or has unacceptable performance, the employee should be notified, in writing, immediately, and a copy of the memorandum should be kept in the personnel file. On these occasions, the employee should be counseled and not just reprimanded. The first objective should be to correct the unacceptable behavior.

Consistent with good judgment, personnel rules should apply consistently to every employee. Any perceived favoritism or differential treatment can lead to serious problems for the employer.

Document everything, in as much detail as possible. When an employee is fired, the employer should plan for and expect a legal challenge. Defending against such a challenge will be very difficult without a detailed file on the employee and the reasons for termination. Before firing an employee, consider if it is necessary to review everything with legal counsel.

When it comes time to fire an employee, consider following this process:

- a. Schedule the termination for late afternoon. The end of the day on Friday is the best time to break the bad news. After being fired, the employee is not happy, but will have the weekend to recover. Also, the employee is spared the humiliation of clearing his/her work area of personal items in front of co-workers.
- b. Take no more than 15 minutes to fire an employee. The employee probably already knows the purpose of the meeting. You can summarize the reasons for termination, but don't get drawn into an argument. If the employee threatens to sue, don't get defensive.
- c. Always have a witness present during the meeting. The witness is there to listen and does not get involved in the discussion. Do not make a tape recording, and do not let the employee make one.
- d. In appropriate cases, you may want to offer the employee the option of resigning. Resignation allows the employee a dignified departure. Also, employees who resign are less likely to file complaints.
- e. You may want to offer the employee an incentive to resign, in the form of severance pay. However, severance pay is not required unless the employee's contract or established personnel policies require it. In exchange, you can ask for the employee to sign a waiver of all claims against the organization. Keep it simple. The more legalistic the waiver, the less likely the employee will be to sign it.
- f. You should be ready with a simple one line resignation letter (if resignation is to be an option) for the employee to sign at the termination meeting. You also should have a simple termination letter (if you do not get a resignation), and any other documents that might be necessary, insurance forms, etc.
- g. The employee should return keys, uniforms and equipment before leaving.
- h. Someone other than the person who did the firing should assist the employee in collecting personal possessions and escort the employee out of the building. Employers always should be on guard to prevent possible disruption or damage that a disgruntled, terminated employee might cause if left alone.
- i. Be clear that after the employee is fired, he/she should not be allowed to come back to visit other employees.

No employer can avoid problems with employees from time to time, and there is no way to guarantee that every hiring and firing process will go perfectly. However, by following these guidelines, you can avoid or limit many problems.

CHAPTER 5

STORMWATER MANAGEMENT

I. INTRODUCTION

Nearly every community association in Montgomery County, Maryland, has some type of stormwater management facility in its common areas such as wet ponds, dry ponds, sand filters, infiltration trenches, oil/grit separators, and underground storage structures. The cost to maintain those facilities is one of the highest expenses a community association faces, along with general landscaping, maintenance of recreational facilities such as pools and pool houses, and insurance.

II. THE TURNOVER PROCESS

County, State and Federal laws require the construction and maintenance of stormwater management facilities to deal with erosion, sediment control, and stormwater runoff. Until 2002, the cost in Montgomery County was born by the individual unit owners in the community association. In 2002, Montgomery County adopted amendments to Chapter 19 of the Montgomery County Code that created a procedure for the County to undertake the responsibility for structural maintenance of stormwater management facilities. By completing this procedure, community associations can become responsible only for nonstructural maintenance, which includes such issues as preventing the accumulation of solid waste, and controlling growth of weeds, trees or brush that will adversely affect the functioning of the stormwater management facility. Turnover to the County of the responsibility for structural maintenance relieves the community association of the expensive burden of accumulating and maintaining a reserve for major capital maintenance, repair and replacement of its stormwater management facilities. The community association does not, however, relinquish ownership of the facilities. The turnover process will require the assistance of professionals, including attorneys, title examiners, engineers, and environmental specialists, depending upon the nature and condition of the stormwater management facility.

The first step is to identify the facilities which the community association has the responsibility to maintain. This includes determining whether the community association owns the facility or has other contractual obligations to maintain the facility. Such information is normally in documents recorded in the Land Records for Montgomery County, Maryland in the form of declarations of covenants for maintenance and grants of stormwater easements. The Montgomery County Department of Environmental Protection can help a community association determine if they own a stormwater management facility that is eligible for turnover to the County.

Communities built after 2002 may have had their stormwater management facility turned over to the County for structural maintenance by the developer. The community's legal documents concerning maintenance will tell the community if

they are responsible for all maintenance or if the structural maintenance has been taken over by the County.

III. COMMUNITY RESPONSIBILITIES FOR STORMWATER

Next, the community association must identify what its responsibilities are. The obligation to maintain a stormwater management facility usually arises from the ownership of the facility located in the common areas of the association. However, it can also arise from covenants or easements that place responsibility for maintenance upon an association even though it does not actually own the facility.

The legal documents recorded when the stormwater management facility was created will identify not only the responsibilities associated with it, but will also determine the procedure for having the County assume structural maintenance. As indicated, those documents usually include a maintenance covenant, and a grant of stormwater management easement. Other documents to review are the governing documents of the association--in particular the declaration of covenants and any related easements or recorded documents--as well as the record plats recorded in the Land Records which identify the parcels owned by the association and/or the parcels on which the stormwater management facility is located. More recent facilities, built within approximately the last ten years, usually have the most complete set of documents. Often surveyor drawings accompany grants of easements and the facility is identified in record plats as well. To the extent that the records identifying the facility, the ownership of the facility and the responsibility associated with the facility are complete, there is less need for professionals to accomplish the transfer.

The greatest practical difficulty in the process of turning over a facility is obtaining a sufficient legal description of the stormwater management facility to prepare the necessary legal documents. The County has provided form documents on its website, but every facility naturally has its own description. If the maintenance, covenants and stormwater easements contain plats or legal descriptions, or the record plats contain legal descriptions or boundaries, then the task is easier. There may be cases, however, where a community association actually has to have the property surveyed and develop the legal description for the easement. The County can assist a community with the survey (at no cost to the community). Recent experience has shown that those cases are rare but they do exist.

Some of the legal issues which have surfaced include the following:

- Some community associations find when they are preparing to turn over structural maintenance of a stormwater management facility that the facility has never been deeded to the association, even though it may have been maintaining for some time and at some expense. The community association must then find the record owner of the facility and obtain a deed transferring ownership to the community association. Usually, the intention at the outset was that the community association would own the facility but sometimes this step is inadvertently omitted.
- Sometimes the community association is responsible for maintaining a facility, pursuant to recorded documents, which it does not own. This can occur, for example, where a homeowners' association in a planned development, which includes both homeowners' associations and condominiums, is responsible for maintaining the stormwater management facility, but the facility is located within the common elements of a condominium. Normally, the operative legal documents sufficiently describe the legal relationships to enable the turnover.
- Stormwater management facilities sometimes serve more than one development. If the legal documents have provided for one entity to maintain the facility, then that entity may take the lead in the turnover. Otherwise, all owners of the land on which the facility is located will have to be involved. They might not all be community associations. The stormwater management facility could for example serve a condominium and a rental apartment complex both of which might be involved in the transfer, depending upon what the recorded documents say.

A condominium with a stormwater management facility has a unique problem. While the facility may be located on the general common elements, because of the nature of the ownership in a condominium, there will be no specific deed from a developer to the condominium for the facility. Rather, all unit owners own the facility as tenants in common. This means that a title examiner will have to locate the original documents which the developer recorded for the facility, which should have been recorded prior to the creation of the condominium. The condominium is still responsible for the facility, but the transfer of ownership of the facility occurs through the transfer of individual units to the unit owners who own the entire condominium project in common with each other. A homeowners' association, on the other hand, will normally have a separate deed establishing its own separate ownership of the facility.

The community association will prepare an original easement and an original declaration of covenants for maintenance, or it will prepare an amendment to an already recorded declaration of covenants for maintenance if an original easement and an original declaration have been recorded. These documents are executed in the same way as any other documents, signed by the president or vice president,

attested by the secretary and notarized. A condominium has an additional procedure that there must be notice to the unit owners and a meeting of the Board of Directors at which the decision to grant the easement is passed by a majority of a quorum of the Board.

The community association then submits the documents to the Department of Environmental Protection. DEP then forwards the documents to the County Attorney to review for legal sufficiency. If the documents are in order and the facility is in proper working condition, DEP will forward the documents to the Assistant Chief Administrative Officer for execution. While this process is going on and before the Assistant Chief Administrative Officer signs the documents, the County will inspect the facility and the community association must make any structural and nonstructural repairs needed to place the facility in proper working order as determined by the County before the County will enter into an agreement that obligates the County to assume responsibility for structural maintenance of the facility in the future.

If the facility has passed inspections and the County has executed the documents, the documents returned to the community association for recording in the Land Records. Once the documents are recorded, they are resubmitted to the County together with a completed application for turning over structural maintenance of the stormwater management facility. The community association will receive a letter from the County advising that the County has accepted responsibility for structural maintenance of the facility. The community association has continued responsibility only for nonstructural maintenance thereafter.

The County's cost for performing structural maintenance of stormwater management facilities is raised by a Water Quality Protection Charge, which appears on the tax bill of all residential and certain nonresidential properties in the County. Authority for the tax is established in the County Code and the procedures for fixing the amount of the tax are established by County Executive regulation. The charge appears on annual tax bills and is collected in the same manner as property taxes.

This brings up another issue. Community associations are not accustomed to paying real estate taxes. Common areas are assessed at nominal or no value and therefore no taxes are due. However, the Water Quality Protection Charge changes this precedent. Condominiums do not face this issue but homeowners' associations do.

Homeowners' associations which own stormwater management facilities and have impervious surfaces will receive tax bills that have a Water Quality Protection Charge for the property they own. If they do not pay the Water Quality Protection Charge, the property will go to tax sale and could be lost or, more likely, great difficulty and expense will result when trying to redeem the property after it is sold.

Homeowners' associations have not had to pay careful attention to their tax bills, and therefore several problems may have arisen which will now have to be addressed. There are numerous instances where developers have failed to provide the taxing authorities with the new address of the homeowners' association, as a result of which the homeowners' association has never gotten any tax bills. When a homeowners' association changes management companies, at times a change in address is not filed with the County Department of Finance and therefore the tax bills will go to the former management company. As stated previously, this has not mattered a great deal until now, but with the Water Quality Protection Charge it does matter whether or not the tax bill is paid.

By using the website for the Maryland Department of Assessments and Taxation, and /or the services of a title examiner, a community association can determine what properties it owns, and can correct records so that it is receiving the necessary tax bills. It is important to know that the Water Quality Protection Charge will appear on tax bills for most common areas with impervious surfaces, **whether or not** a common area has a stormwater management facility located on it.

Questions about the process for locating stormwater management facilities and accomplishing their turnover can be answered by accessing the Montgomery County, Maryland website, Department of Environmental Protection, Stormwater Maintenance Program, or by calling the Montgomery County Department of Environmental Protection directly.

CHAPTER 6 REPLACEMENT RESERVES

I. DEFINITION OF REPLACEMENT RESERVES

Maryland law requires that community associations accumulate funds towards future replacements. The idea behind this is for owners in a community to contribute their fair share of the cost to maintain the community infrastructure. Since most residents remain in communities for relatively short periods of time, this system, when fairly implemented, prevents any one group of residents at a specific time from bearing a disproportionate share of the cost of major replacements.

II. DECIDING REPLACEMENT RESERVES

A reserve study is a budget planning tool that identifies items to be included in the reserves, estimates their replacement cost and remaining service life, and calculates the annual contributions needed to fund the projected expenditures. The reserve study consists of two parts: the physical analysis and the financial analysis.

Most communities engage a professional property manager, engineer, or reserve analyst to perform a reserve study to calculate the appropriate level of reserve contributions. For many communities, a single knowledgeable individual can adequately assess the property and calculate the needed reserves. In the case of large and complex properties, a team of professionals with specialized knowledge of building systems may be more appropriate.

Parties with a role in deciding reserves include the following:

- Community representatives. This includes the Board and possibly a committee of interested community members
- Management staff (for properties with professional management)
- Engineers, architects, reserve specialists, or other qualified individuals
- Community accountant/auditor
- Financial consultants

III. WHEN TO DO A RESERVE STUDY

Because calculating reserves involves future projections and estimates that cannot be perfect, a reserve study is a dynamic document that requires periodic reviews and updates. The consensus of the community management industry is that management and the Board should review and adjust the reserves annually, and

that a detailed review by a qualified independent third party should be done at least every three years. Each reserve study is based on an assessment of the property's condition at a particular time. The assessment and expenditure projections change with changing conditions.

IV. THE ROLE OF COMMUNITY GOALS IN DECIDING RESERVES

The community's objectives largely determine the reserves. Some communities wish to minimize current expenses and are tolerant of less-than-perfect appearances. Some communities wish to keep the community in first-class condition at all times. Most communities fall somewhere in between these two extremes. However, the ongoing cost of maintaining a first class property is substantially more than the cost to fix or replace components as they break. A community needs a clear definition of their objectives to decide the appropriate levels of assessments for reserves.

V. BASIC COMPONENTS OF A RESERVE STUDY

A full reserve study includes a *physical assessment* of the property and a *financial analysis* of the reserve funding.

The physical analysis includes an inventory of property components, an assessment of their current condition, an estimate of their service lives, and an estimate of their value. The financial analysis includes calculations of future expenditures and the method of funding the expenditures.

Types of Reserve Studies

Reserve studies and their constituent parts can be classified as follows:

	Full reserve study	Update study with site visit	Review study with no site visit
Component inventory	X		
Component verification		X	
Life & valuation estimate	X	X	X
Financial analysis	X	X	X

Information to Include in a Reserve Study

The following basic information should be included in a reserve study:

- Number of units
- Type of community
- Number of buildings
- Description of the physical assets
- Year built
- Level of investigation
- Sources of information

A list of components is needed for calculating the future expenditures. The following list is not exhaustive, and many items may not apply to a given property. This list is intended to illustrate the types of items normally found in reserve studies:

- Replacement of mechanical, electrical, and plumbing equipment.
- Major overhauls or rebuilding of large equipment.
- Replacement of water distribution piping and drain pipes. The service life of piping is long but finite. When it needs replacement, the costs can be substantial because of the difficulty of access and working in an occupied building.
- Elevator modernization or replacement. Many communities have "full service" elevator maintenance contracts that appear to cover all replacements. However, they normally only cover replacement in kind. When controls and hoisting equipment needs modernization, these service contracts normally will not cover modernization costs.
- Replacement of major components of fire protection and fire alarm systems. Building and Fire codes require annual testing of terminal devices in fire alarm systems and replacement of these devices. It is usually included in the annual operating budget rather than reserves.
- Replacement or overlays of pavement and walkways.
- Replacement of retaining walls, fences, and other site improvements.
- Cleaning or dredging storm water ponds.
- Major drainage improvements. As settlement and erosion change ground profiles, costly drainage improvement projects are often needed.
- Swimming pool equipment and piping.
- Swimming pool decks, fences, tile, coping, white coating, and fixtures.
- Recreation courts and equipment.
- Vehicles owned by the community.
- Large repairs and refurbishing of building exteriors and facades. For high-rise buildings, this can be one of the most costly items.
- Balcony and deck repairs and replacements.
- Replacement of railings and hand rails.
- Roof replacements.
- Parking garage repairs.

- Waterproofing and toppings on plazas over underground structures.
- Common area interior redecoration and replacement of furnishings.
- Office equipment owned by the Association.
- Replacement of common element doors and windows.
- Large repair or maintenance projects that occur every few years. For example, if painting, caulking, and replacing rotted wood trim on a large building costs tens of thousands of dollars and is done every five to ten years, this cost is usually included in reserves.

Other Criteria for Inclusion in a Reserve Study

Other considerations for inclusion of items in reserves may include the following:

- A threshold amount may be applied. For example, many communities do not include items with a cost of less than \$5,000.
- A time frame for the analysis is either explicitly or implicitly used. For example, many studies explicitly show a study period of 20, 30, or 40 years. The minimum recommended time frame is 20 years. However, all components have a finite life, even the building structure. Consequently, a time frame is implied even if not explicitly stated. Ultimate service lives of basic components like the building structure and utility lines can be a significant factor in older properties.
- Some items are never replaced in their entirety. Concrete sidewalks are a common example. Accepted management practice is to replace damaged sections every few years. There are several different ways that this can be handled in making reserve assessment calculations.
- The effect of service contracts on equipment replacement needs to be considered. The example of elevators was discussed above.

Determining the Value of Components

The following information is used to determine values of reserve items:

- Remaining useful life and normal useful life. There are published useful service lives for most property components, but the actual performance of a component in a given property depends on many factors that cannot be anticipated by the published information. This is why the physical assessment is important.
- Current replacement cost. Original construction costs are normally inadequate because working in an occupied property is entirely different than new construction. Costs are usually estimated based on the quantity and unit cost for a component.
- There is no fixed or correct value for a given item. As anyone who solicits proposals for repairs or maintenance knows, the value of items is influenced by many factors, including the following:

- Anticipated seasonal weather changes. The time of year for the work often influences cost, especially if outdoor work is involved.
- The contractor's current work load. The markup will usually be higher if the contractor is busy.
- Labor costs. Labor costs typically account for a higher percentage of the project cost on repair work than on new construction. Labor is considered by the contractors to be the highest risk and therefore it can be highly variable. Labor rates and productivity vary between contractors, therefore, different contractors may submit different bids for the same well-defined tasks.
- Project conditions. New construction occurs on a job site controlled by the contractor. Repairing an occupied building is influenced by many factors beyond the contractor's control. Therefore, the contractor's perception of the job conditions has a large effect on cost.

A reserve analyst's cost estimates for repairs and replacements will differ from the actual costs. One reason is the complete details of the proposed work are not known when budget estimates are made. Also, industry experience is that bid prices for repair and restoration work vary widely for the reasons noted above, even when contractors are basing their pricing on detailed plans and specifications. It is not unusual for bids to vary by 100% from the low to high firm, even with extensive information for bidding.

Limitations of Reserve Studies

A reserve study is *not*:

- A warranty
- A verification of code compliance
- A detailed engineering analysis or evaluation of past or future design modifications
- A specification for replacement or repair
- A prescription for how the Association must provide funding
- A statement about the tax status of individual expenditures

Special Considerations for New Communities

In new communities, the developer usually collects data for computing the reserve assessments before construction begins. This is because information must be provided before construction for participating builders and public offering statements. Changing the reserve information as communities are developed may jeopardize contracts. Consequently, the basis for computing the reserves often changes between the time the developer publishes community budgets and the time the community is fully built out and sold. It is advisable for communities to perform a full reserve study as a part of the transition from developer control.

Special Considerations for Large Communities

Many large communities are delivered in phases. It may be important for reserve studies to take into account the timing of components as they are delivered. Often, the community design evolves and adjustments in the reserve calculations are needed. Many large communities have multiple associations with complex boundaries and divisions of responsibility. These distinctions need to be accounted for in reserve calculations.

Special Considerations for Mature Communities

Mature communities often have well defined objectives and long term plans that have resulted from years of planning effort by community members, professional managers, and other parties. For these properties, reserve studies should be a collaborative effort involving the Board, professional manager, reserve analyst, and auditor or accountant.

Special Considerations for High Rise Buildings

Often these buildings have complex systems that require more expertise to assess. Treatment of assessments may need adjustment when all units do not have the same components. For example, all units may not have balconies and the community policy may be to apply assessments for balconies only to those units that contain balconies. The largest costs are usually associated with the exterior envelopes, garage structures, and plazas, not the mechanical components.

Special Considerations for Mixed Use Communities

It is essential to understand the boundaries and division of responsibilities. Some items may be shared and funding responsibility shared. Different parts of the community may have different standards and expectations that will affect the reserve amounts.

Special Considerations for Older or Historic Properties

- Effects of architectural district restrictions must be considered.
- Older properties usually have higher levels of funding requirements than newer properties.
- Funding requirements for rehabilitation of electrical power distribution, and plumbing systems may be difficult to estimate.
- Structural rehabilitation may be needed.

Methods of Calculating Reserve Assessments and Funding

Prior to the availability of computerized spreadsheets, the calculation of reserves was very tedious and many simplifying assumptions were used to make the process practical. As the use of computer spreadsheets became common, the ideas of the simplifying assumptions became confused and many erroneous ideas about different answers produced by different calculation methods have become widespread. Mathematically, the fact is that *all calculation methods will yield exactly the same answer if the assumptions are the same*. The perceived differences lie solely in hidden differences in the assumptions made by the reserve analyst.

Reserve calculation methods can be classified as follows:

- Traditional component method. This was the method used before computer spreadsheets. The assessment is determined by dividing the replacement cost by the number of years of service life. Inflation was not included in the analysis. Different managers had different methods of adjusting for inflation.
- Component method with inflation. This is the same as the traditional component method except that an inflation rate is assumed and incorporated into the calculation.
- Cash flow method. The projected expenditures are arranged in chronological order and the assessments needed to fund the cash flow are determined.

Most reserve analysts use one of the two latter methods of calculation because the traditional component method underestimates reserve funding requirements since inflation is not considered. The cash flow method is most often used because it shows a clear picture of the anticipated costs and timing in a way that is useful for property managers. Another reason cash flow methods are popular is that component method calculations provide less flexibility in modeling project phasing, variable contributions, and funding alternatives than cash flow methods. However, as noted above, all calculation methods yield the same answer if the underlying assumptions are the same.

Other Considerations in Making Reserve Calculations

The following issues often arise in considering reserve calculations:

- Increasing the annual assessment at the same rate as inflation makes the analysis insensitive to varying inflation rates.
- Putting interest on invested funds back into reserves substantially decreases the amount of assessments needed over time.
- Phasing projects usually does not decrease funding requirements. It usually increases the overall funding needed, especially when inflation rates are high.

Federal Housing Administration Guidelines

The Federal Housing Administration has adopted guidelines that condominiums (but not cooperatives and HOAs) must meet in order for the FHA to guarantee the mortgage needed by the potential buyer of a condominium unit. If the condo can't meet the guidelines, the buyer won't be able to obtain the FHA loan and will have to find a conventional or other loan. This will make it more difficult for unit owners to be able to sell their units. The FHA guideline states that condominiums must set aside 10% of their annual assessments for the reserve fund.

Many condos can't meet this standard immediately; others may have created a properly-funded reserve and do not need to continue placing 10% of the assessments into the reserve. While the FHA might be flexible on this issue, condominiums should be aware of it, and should use the 10% guideline as a factor to be considered in their financial planning.

Suggested related publications

CAI Best Practices, Report #1 Reserve Studies/Management, published by the Foundation for Community Association Research, 2001.

CHAPTER 7

FINANCIAL PROCEDURES FOR RESIDENTIAL ASSOCIATIONS

I. ACCOUNTING SYSTEMS

There are two common types of accounting systems, the cash system and the accrual system.

The cash system records income and expense transactions as the cash is received or paid out. This is the most common system of accounting found in small associations with few transactions but it is also an option for larger associations, provided that subsidiary reports on delinquent accounts and a list of unpaid invoices accompany the statements.

The accrual system records transactions in the period when they occur or are due, not necessarily when the cash is received or expended. Examples of major accounts that are included in the accrual system, but not in the cash system, are accounts receivable, prepaid expenses, accounts payable, accrued expenses and prepaid assessments. The accrual system is more complex to prepare than the cash system and may provide the association a more complete picture of its financial situation.

Accounting systems utilize several records for recording financial transactions. Cash receipts and cash disbursement journals are used as chronological records of detailed transactions. Data from these journals are then entered into a general ledger, which is organized by accounts classified into assets, liabilities, equity, income and expense. The financial statements are prepared from the general ledger balances. Therefore the accounts in the general ledger should correspond to the accounts outlined in the association's budget so that comparison between periodic financial statements and the budget can be made.

II. FINANCIAL STATEMENTS

The association's Board of Directors needs timely, comprehensive financial information to make financial decisions. An understanding of the association's financial condition is also helpful to potential buyers in assessing their possible investments. The basic components of the financial statements are: balance sheet, income statement, statement of changes in members' equity or fund balances and statement of cash flows. Other important reports include a comparison of expense with budget and a trend report by month.

The Balance Sheet

The balance sheet reflects the association's financial position at a point in time. It is comprised of three major categories: assets, liabilities and “members equity” or fund balances. The term “balance sheet” applies to the accounting equation that assets equal liabilities plus member's equity or fund balances.

1. Assets

Assets represent what the association owns and will generally include: cash, investments, accounts receivable, prepaid expenses and fixed assets (property and equipment less accumulated depreciation).

2. Liabilities

Liabilities represent what the association owes to others and includes: accounts payable, prepaid assessments and accrued expenses. Less common liabilities include notes payable (if the association has borrowed funds) and mortgage payable (for an association-owned unit).

3. Members' Equity

Members' equity represents the association's net worth at a point in time - what it owns (assets) minus what it owes to others (liabilities). The members' equity is generally divided into two categories: replacement reserves, which represents the amounts designated for future major repair, and replacement of the common property components and un-appropriated members' equity, which represents the accumulated excess operating funds that the association has built up since its inception. An initial working capital fund or special project fund may also be included within the un-appropriated members' equity section. Initial working capital represents a contribution of initial homeowners' to fund start up expenditures of the association. The special project fund is established to temporarily fund a project designated by the association. If the association uses fund reporting (*see below*) the titles of the equity section would become Fund Balances and the categories would become replacement reserve fund and operating fund.

4. Income Statement

The income statement reflects the financial activity of the association for the period. Assessments, other revenues and expenses are summarized by category and show the net profit for the period. To be most informative, income statements should include the current period activity, year-to-date activity and budget comparisons.

5. Statement of Members' Equity

The statement of members' equity reflects the transactions in each account in the equity section of the balance sheet. It reconciles the beginning and ending fund balances with the results of operations for the period. Inter-equity transfers (transfers amongst the various components in Equity, i.e. reserve account un-appropriated equity, or other special accounts) are also reflected on this statement. This financial statement should be included as part of the monthly financial reports.

6. Statement of Cash Flows

The statement of cash flows shows the sources and expenditures of cash for the period. It is broken down into operating, investment and financing categories. Operating cash is generated by member assessments for the most part and expended for operating expenses. Investing cash may reflect the change in investments from the prior period and payments for fixed assets, for example. Financing cash represents cash received or expended for loans, initial working capital contributions and inter-fund equity transfers and borrowings. The statement of cash flows also reconciles the net income from the income statement to the cash balance on the balance sheet.

The statement of cash flows for a cash accounting system is shown on the income and expense in a current month. This should be included in a monthly financial report for an accrual system.

III. AUDITS

An annual audit by a Certified Public Accountant provides reasonable assurance that the association's financial statements are free of material misstatement and present fairly the financial condition of the association in accordance with generally accepted accounting principles. The audit includes examining, on a test basis, invoices and other original source documentation, evaluating the accounting principles used and the financial statement presentation. The audit does not include examination of every transaction nor can it verify the accuracy of the financial statements beyond a reasonable assurance. The audit is also not designed to detect error or fraud that is not material to the financial statements.

Annual audits might be required by the governing documents, and the Condominium Act allows members to petition for an audit performed by an outside contractor once a year.

Two reports that should **NOT** be mistaken for an audit are the compilation and the review. The association's legal documents or state statutes may require an annual audit. Even without this requirement, it is prudent for the association to elect to have an audit performed rather than a compilation or review. The audit provides an added assurance for the association that the financial statements reasonably present the financial condition of the association. Since the audit is prepared by an accounting firm familiar with the unique issues of community associations, the association has further assurance that tax issues, replacement reserves and funding are handled correctly.

1. **Compilation** - A compilation is limited to presenting financial statements from information prepared by the association. It does not include audit or review procedures and will not provide any more assurance than the statements produced by the association itself.

2. Review - A review consists primarily of inquiries and analytical procedures and provides very limited assurance that the financial statements are presented in accordance with generally accepted accounting principles.

AICPA Audit Guide and Contents of a Standard Audit Report

Originally issued in 1991, the AICPA (American Institute of Certified Public Accountants) "Audit and Accounting Guide: Common Interest Realty Associations," describes conditions and procedures unique to the industry and provides uniform accounting treatment for associations. The guide is updated periodically to reflect recent pronouncements. The AICPA Guide requires associations to disclose additional information about future major repairs and replacements of its common property. This supplementary information is outside of the basic financial statements and is not audited by the auditors. Included in the presentation of components to be repaired and replaced are estimates of the remaining useful lives of the components, estimates of current or future replacement costs and amount of funds accumulated for each component to the extent designated by the association's board or directors.

The standard audit report includes the following items:

- Opinion Balance sheet
- Statement of revenues, and expenses
- Statement of changes in fund balances or statement of members' equity
Statement of cash flows
- Footnotes--supplementary information on Future Major Repairs and Replacements

The opinion page emphasizes that the financial statements are the responsibility of the association's management and the audit expresses an opinion that, in all material respects, the financial statements present fairly the financial condition of the association in conformity with generally accepted accounting principle.

If, for any reason, the audit does not express a clean opinion, the explanation will be described on the opinion page.

Footnotes disclose certain information about the nature of the association including: its legal form, services, tax status and filing, common property, special assessments, number of units owned by the developer, funding for future major repairs and replacements, assessments that were used for purposes other than those for which they were designated, related parties, significant sources of revenue and other disclosures as deemed necessary under the circumstances and as required under generally accepted accounting principles.

Fund Accounting

Associations conduct and report on two primary kinds of activities: a) normal maintenance and service operations and b) long-term major repair and replacement requirements. Associations usually assess their members for both purposes and generally should report such assessments separately. The AICPA Audit Guide above recommends, but does not require, fund reporting for associations because it is the most informative method of presenting these separate activities. Under fund reporting, the financial presentation for the operating fund and the replacement fund should each include information about assets, liabilities, income and expense activities and fund balances. Assets included in the replacement fund usually consist of cash and investments. Liabilities in this fund are generally for work done on contracts for major repairs and replacements.

As a result of fund accounting, an association may have inter-fund receivables or payables from either of the following:

- Obligations of one fund are paid for with the assets of the other fund.
- Amounts assessed for the activities of one fund are collected, but not transferred, by the other fund.

Corresponding inter-fund receivables and payables should be presented to highlight the transactions resulting in these balances and to provide information about amounts assessed and collected that were not used in accordance with the budget.

Management Letter

During the audit, the auditors may note matters that should be brought to the attention of the board of directors. Though not required, the auditor may prepare a management letter which addresses any financial or operational aspect of the association as a method of providing opportunities for improvement or relaying pertinent information. Comments frequently included in management letters generally fall into the following broad categories: legal documents, accounting procedures, replacement reserve fund, insurance, taxes and other issues.

Representation Letter

The representation letter is addressed to the auditor and is signed by the association's officer(s) and, if applicable, the management agent. The letter is important to remind the officers and management agent of their responsibility for the financial statements, as well as their responsibility to provide the auditors with complete and accurate information. The auditor is required by auditing standard to obtain a signed representation letter as part of the audit of the association's financial statement.

CHAPTER 8

ASSESSMENTS AND THEIR COLLECTION

All community associations, condominiums, homeowners' associations, and cooperatives sustain themselves by collecting assessments from their members. Budgets are expense-driven and therefore it is necessary for the Association to be proactive and aggressive in the collection of the owner assessments. At no time may an owner withhold payment of an assessment to protest an action or inaction of the Association.

I. AUTHORITY TO ASSESS FINANCIAL OBLIGATIONS ON OWNERS

The authority to collect assessments is recognized in Maryland law and is created by the association documents recorded in the land records. In almost all cases, the authority to create and collect assessments is usually found in the Declaration (Master Deed or CCR). The types of charges which a community association may collect include:

1. Assessments (which may be assessed annually, quarterly or monthly);
2. Special assessments (a one-time assessment although may be collected over a period of time);
3. Collection costs in connection with collecting delinquent assessments;
4. Administrative costs in connection with collecting assessments;
5. Late fees;
6. Interest on delinquent assessments;
7. Legal fees.

A community association can only collect charges which its documents or Maryland/County laws specifically allow. If the documents do not allow late fees, then it cannot collect late fees unless it amends its documents. The same is true with interest, legal fees, collection costs and administrative costs.

II. ANNUAL OR SPECIAL ASSESSMENTS

Assessments are usually either annual assessments or special assessments. The annual assessment is the most typical charge that a community association collects. Normally, the operative documents provide that the members of the association are responsible for an annual assessment to fund an annual budget adopted either by the Board of Directors, or in some cases by the members themselves. The annual assessment must be sufficient to cover the costs identified in the budget, which include both operating costs and contributions to reserves for replacements. Therefore, association budgets are expense driven and should not be set by reference to some ideal assessment level.

Most community association documents also allow for an assessment of what is called special assessment. Sometimes the board of directors can adopt a special

assessment, but some association documents require the vote of the members. There may be limitations in the documents on whether a special assessment can be collected over more than one fiscal year.

III. FIXING AMOUNT OF ASSESSMENTS

Normally, fixing assessments is a two-tiered process. The board of directors adopts an annual budget and fixes an assessment which will pay for that budget. The board can raise the annual assessment, but only by a limited amount. To raise the assessment above that limit requires a vote of the members. The limits are identified in the governing documents. The Association must first provide a draft budget to the ownership at least thirty (30) days prior to its adoption at an open meeting.

There are also statutory limits on some of the charges that may be collected. In particular, there are limits on interest charged against a delinquent balance, the amount of the fee, and the number of times a late fee may be collected (only once on each late assessment payment).

As stated above, the most commonly seen assessment is the annual assessment. The annual assessment is usually collected in monthly, quarterly, or annual installments. The community association also usually has the right to “accelerate” the annual assessment for the remainder of the fiscal year if the member is delinquent. For example, a member may have the right to pay a monthly assessment by the 1st of each month, but if the assessment is not paid in any given month, then the right to pay monthly is lost and the entire balance for the rest of the fiscal year is due and payable immediately. Interest will usually run on the full amount from the due date.

Normally, community associations adopt a collection policy by a board resolution, which addresses due dates for assessments, interest, collect costs, administrative costs, late fees and legal fees, all as permitted by their documents and by applicable statutes. Collection policies can also address the allocation of assessment payments. For example, a collection policy may state that any payment will be applied to the oldest balance due first, or apply to outstanding costs and legal fees first and then to assessments or any other combination of formulas.

IV. COLLECTION OPTIONS

Almost no community association has a zero delinquency rate. Consequently, the community association, its managers, accountants and attorneys must all become familiar with collection options. In Maryland, there are two options. The first is to file a lien against the unit under the Maryland Contract Lien Act. This statute has procedures for notice to property owners, opportunities to challenge or question the amounts due, legal relief, and ultimately legal action in the Circuit

Court for Montgomery County. If a lien is filed, the association may collect that lien by a foreclosure action much the same as a foreclosure on a mortgage or deed of trust by a lending bank. It is worth emphasizing that under this Act, the Association does not need a court's approval to file its lien—if the homeowner does not pay in full after a proper written demand, the Association can take its lien papers to the Land Records office and file them.

The second option is an action in the District Courts of Maryland, which have jurisdiction up to \$25,000. Most of the claims in the District Courts for assessments will be what are called small claims, that is \$5,000 or less. A small claim is heard before a judge, but on an informal basis. Usually, but not always, a trial is involved in which the plaintiff is the community association and the defendant is the member who owes the assessment.

The advantage of the statutory lien under the Maryland Contract Lien Act is that it is a fast procedure for protecting the Association's claim by placing an obstacle on the transfer of ownership to property or refinance of the property without first paying the overdue assessment. The disadvantage is that payment can only be obtained from a sale of the property if the member does not pay voluntarily or by a foreclosure action. There is no access to other assets of the debtor to pay the lien. Additionally, the process for foreclosing on a statutory lien is expensive.

The advantage of a judgment in District Court is that it can reach any asset of the debtor's real property or personal property, such as bank accounts, automobiles, wages and rental payments due to the debtor. A judgment is less expensive to enforce after it is obtained, in addition to the advantage that it reaches more assets.

In general, Associations protect their interest by placing a lien on the property as well as seeking a personal judgment and/or foreclosure. The Board of Directors should authorize these actions only after consultation with their professional manager and/or legal counsel.

There are Federal laws which govern the collection of assessments, in particular, the Fair Debt Collection Practices Act. This law requires certain specific notices to a debtor regarding the nature of the debt, the identity of the creditor, the opportunity to receive verification of the debt and the filing of legal actions. This law limits the kind of contacts which a creditor or a creditor's agent may make with a debtor. The Act also limits such practices as publishing the names of debtors, calling debtors at work or at home and contacting debtors through the mail.

The Fair Debt Collection Practices Act defines the term "debt collector" and then prescribes collection tactics of debt collectors. A debt collector is, broadly, anyone who regularly collects debts owed to another. When a debt collector contacts persons to locate a debtor, for example, the debt collector is not permitted to state that the debtor owes any debt, is limited to the number of times it can

communicate with persons, may not communicate by postcard, and, after the debt collector knows that the debtor is represented by an attorney, must communicate through the debtor's attorney.

A debt collector may not communicate at unusual times or places with a debtor. There are limits on communicating with third parties about the debt and on communicating with the debtor after the debtor has asked that communication cease. The statute addresses harassing or abusive conduct such as the use or threat of violence, the use of obscene or profane language, the publication of a list of debtors and engaging in annoying telephone calls. The statute also prohibits misleading representations, such as the threat to take any action that cannot be legally taken or that is not intended to be taken.

Maryland law also regulates debt collection practices. Debt collectors must be licensed as such (unless they are attorneys acting for a specific client). In addition, Maryland law prohibits abusive debt collection practices not only by debt collectors but also by the creditors themselves. Thus, under Maryland law, Associations must not engage in any of the prohibited practices such as abusive language, discussing the debt with employers or other persons, contacting the member at unusual hours, etc. (Maryland Commercial Law Article, Section 14-202.)

The foregoing is a broad statement of the types of activities controlled/prohibited by the Fair Debt Collection Practices Act and other laws, but is not a substitute for reviewing the laws themselves. These examples should be sufficient to alert community associations to the issues. The penalties for violating the laws can be severe and expensive.

V. BANKRUPTCY CONSIDERATIONS

Any discussion of assessment collection must include the issue of bankruptcy. Community associations typically see two types of bankruptcy: Chapter 7 and Chapter 13. On rare occasions, they may see a Chapter 11, which is similar but not identical to a Chapter 13.

Chapter 7 bankruptcy involves a sale or liquidation of all assets not protected by law to pay eligible debts; thereafter the debtor is discharged from those debts.

Chapter 13 bankruptcy is a proceeding which involves a plan for repayment of debts over three to five years. In the course of a Chapter 13, debts may be paid and/or discharged just as in a Chapter 7.

Chapter 11 bankruptcy is almost identical to a Chapter 13 except that it applies to a corporation instead of an individual.

The community association may no longer pursue any debt which arose prior to the filing of the bankruptcy. The date of filing of a bankruptcy is therefore an important date. For condominiums, a debtor remains responsible for condominium assessments so long as the debtor resides in the condominium. For homeowners' associations, a debtor remains responsible for assessments so long as the debtor owns the property. Therefore, it is important to track the status of assessments due after the date of the bankruptcy filing.

Where there are assets in a Chapter 7, and in virtually every Chapter 13, the community association should file a proof of claim. A proof of claim sets forth the amount owed by the debtor to the association at the time of the filing of the bankruptcy. Debts are paid in order of priority established by bankruptcy law. Debts may be paid in full or in part or discharged in either type of bankruptcy. Usually, where there is a Chapter 7 bankruptcy there are not sufficient assets to pay the community association.

An important distinction among the priority of debts in a bankruptcy is whether the debts are "secured" or "unsecured". A community association which has filed a statutory lien under the Maryland Contract Lien Act or which has a recorded judgment against the debtor has a secured debt, secured by the real property in the association and owned by the debtor. In most circumstances, a secured debt, or lien, whether it is a statutory lien or a judgment lien, will survive the bankruptcy with one important limitation. The debt may only be collected against real property, since after the bankruptcy the personal obligation of the debtor is discharged. The debt cannot be collected against personal assets of the debtor.

A member of a community association who files for bankruptcy but remains the owner of property in the association continues to be responsible for annual and special assessments which arise after the date the bankruptcy is filed. As said above, if a condominium unit owner moves out of the property, he/she is no longer responsible for assessments after the move, but the property remains obligated. A homeowners' association owner remains responsible whether or not he/she resides in the property after the bankruptcy.

One important protection of a bankruptcy is the automatic stay. When a debtor files for bankruptcy, creditors are automatically precluded from taking to collections pre-bankruptcy debts, or post bankruptcy debts against property which is subject to the bankruptcy. Even though a debtor is responsible for new debts which arise after the filing of the bankruptcy, the automatic stay prohibits any action until the stay is lifted by the court. There is a process for doing so: filing a motion for relief from the automatic stay. Action against the debtor while the automatic stay is in effect is prohibited and the penalties for violating an automatic stay are severe, including contempt of court findings and assessment of attorney's fees.

The practice in Maryland has been that when a motion is filed, if the debtor is

represented by an attorney, the stay is conditionally lifted by consent, for relief from the automatic stay giving the debtor time to bring current any post bankruptcy arrearages. If the debtor fails to do so, or fails to stay current, then the stay is completely lifted and the community association may proceed under the order lifting the stay with any remedies which are available.

Members of boards of directors of community associations should have an overview of the process whereby their annual and special assessments can be collected. The prudent board will rely on competent professionals rather than to attempt self-help. As previously stated, the penalties for violating the debt collection and bankruptcy laws can be severe.

The CCOC has a booklet, also available online, on "Assessments & Your Community" that helps to explain a member's rights and duties. Associations are encouraged to distribute it to their members.

CHAPTER 9

OPERATIONS AND FINANCE

I. BUDGET PROCESS

Introduction

Without doubt, the most important recurring event in the life of any condominium, cooperative, town home or property owners' association is the preparation of the annual budget. That is when tentative plans are made to maintain, expand, or even reduce the community's operations. One of the most embarrassing moments for any board of directors is the discovery that expenses have exceeded income for no other reason than a poorly developed budget.

Governments, corporations, partnerships, sole proprietorships, and non-profit organizations all prepare annual budgets, but there is probably no place where the spotlight shines as brightly as on those responsible for them than in common ownership communities. The budget is used to determine how much money the community's owners will have to pay. Very few owners want to pay one penny more than needed. They expect a certain level of services to be provided, and do not appreciate being informed during the fiscal year that the budget was not sufficient to provide those services. Board members are like local politicians, and understandably feel "on the spot" when they have to explain such a turn of events to their fellow owners.

The annual operating budget is an exercise in planning income levels that will be sufficient to balance anticipated expenses during the coming fiscal year. A budget is not a spending plan or a commitment to undertake certain projects or contracts. Those commitments come later after votes are taken and contracts are signed. All things being equal, and barring significant unforeseeable surprises, actual income and spending levels should equal the forecast of the budget with relatively little deviation. It is no accident or luck when that happens. It is the result of good budgeting and good spending discipline.

The best time to start developing your next budget is right now! Many communities wait until "budget season" and then scramble to get it all done. Scrambling is a good way to make certain errors and oversights occur. Much of budget preparation is lengthy information gathering and organization, as well as making judgment calls. There is no need to wait until budget season to do all those things. Getting as much done as far ahead of time as possible makes the budget process less stressful and allows time for sober review of those judgment calls and any revisions that seem to be needed.

Budget Philosophies

There is no one "right" way to prepare a common ownership community budget. There are different approaches that reflect different philosophies about the subject. Some favor general budgets, while others favor detailed budgets. Some prefer a line item budget while others prefer a program budget. Some believe each amount in the budget must be calculated to the dollar, while others favor round sums. When is it permissible to develop the budget on the basis of the previous year's known costs, and when should a "zero-based" budget be developed? The best way to make these decisions is to discard previously-held convictions and analyze what the budget is supposed to do and what the community and its leaders need.

The first question that must be asked and answered is, *"What level of detail is needed in this budget?"* Small budgets, with relatively few dollars split into many different categories, can end up costing more in administration than the additional detail proves to be worth. On the other hand, a large budget divided into relatively few categories can leave board members and managers in the dark when spending overruns occur. As a general rule, begin with whatever level of detail has already been established and create additional details where circumstances appear to make it advisable.

Line item budgets divide projected income and expenses into known discrete categories. Most common ownership communities use a line item budget and group similar line items together into broad categories for convenience. For example, it is useful to group all annual contracts that have a fixed cost. Since those contracts, once signed, are inflexible obligations, and their costs are fixed, they really cannot affect one way or the other, either the board's or management's control of costs.

Program budgets attempt to group together all income and expenses that are related to a "cost center" so it can be readily seen what that cost center's impact is on the budget as a whole. This is a meaningful technique in business, where it is used to determine whether the cost of a particular center justifies its continued operation (for example, is it paying its own way?). Unfortunately, program budgeting in a common ownership community is only meaningful if the cost center is one where income, apart from assessments, can be adjusted to offset changing costs. Creating a cost center for the community swimming pool is somewhat pointless if the costs are paid from the assessments rather than admission charges.

Will the budget be a **"cost plus"** or **"zero-based" budget**? That is one of the more important questions rarely addressed in most communities. Most community budgets are developed year after year by taking the most recent available cost data, and increasing it by a percentage factor ("cost plus") that estimates the amount of change expected during the coming budget year. The

problem is, over time, this approach leads to a budget that is nothing more than estimates built on estimates *ad infinitum*. The alternative, while more time consuming to develop, is to "start from zero," hence the term, "zero-based." It involves analyzing actual expenses, often for several years, determining which expenses were routine and can be expected to continue, and discarding those expenses that are unlikely to repeat.

For example, in developing a cost estimate for plumbing repairs in a 30 year old high-rise building, it is likely a number of valves were replaced each year over the past several years. These are relatively costly repairs, but once all the valves have been replaced, it's very unlikely more will have to be replaced until another couple of decades have passed. A cost plus budget might overlook that fact, while a zero-based budget would discard valve replacement costs once all the valves have been replaced and develop an average (from several years' experience) of more routine plumbing repair costs for the building.

As stated earlier, developing a zero-based budget is time-consuming. It should also be obvious that developing a zero-based budget every year is pointless. Perhaps the most practical solution is to apply "zero-base" budgeting to about twenty percent of the budget every year on a rotating basis. In that way, every part of the budget will get that kind of scrutiny at least every five years.

It is wise to remember there are two other documents that portray the income and expenses of a common ownership community. **Budgets and accounting reports** deal with the same things, only at different points in time. One is a forecast, the other a history. It is not only difficult to reconcile, but can actually result in much confusion and needless argument if the monthly or quarterly income and expense reports use a different level of detail than what is shown in the budget. For clarity and to minimize errors, once a budget format is decided upon it ought to be reflected in precisely the same format in the monthly or quarterly income and expense reports. For that reason, discuss the proposed grouping of accounts with whomever is keeping the community's books to be sure they are comfortable with what is being contemplated.

The second document that represents the income and expenses of the community is the annual audit. Owners who watch every expense like a hawk, and every community has some of these, will attempt to correlate amounts shown in the audit with those represented in the budget. If the auditor is using different groupings than the budget and the income and expense reports, confusion and argument will ensue. Once a budget format has been decided upon and duplicated in the monthly or quarterly income and expense reports, instruct the auditor to organize the income and expense statement in the audit to precisely follow that format. One further advantage of this approach is that it will enable past audited income and expenses to be included in a multi-year comparison of the community budget. Such comparisons provide a clearer picture of the evolving nature of income and expenses, and help to illustrate why assessments may need to change as well.

The Wrong Way to Budget

Unfortunately, many common ownership community leaders forget the overall purpose of budgeting and approach it with their minds already made up about the outcome. That is, they strive to "force" the budget to balance despite projected increases so no increase in the monthly or quarterly assessment will be needed. In doing so, they do a tremendous disservice to their communities, even if many of the owners will regard them as local heroes for having done so.

The primary obligation of the board of directors of any common ownership community is to assure there are sufficient funds to properly maintain the community. Its primary duty is *not* to keep assessments from going up. In fact, when a community goes several years without assessment increases, it is a virtual certainty that the maintenance and upkeep of the community will suffer. It is easy to understand why this is the case. Every community has certain costs whose increases cannot be controlled. Utility charges, salaries, insurance premiums and essential service contracts, to name just a few, usually increase no matter what the community does to prevent it. When these costs as a group increase even a little, and assessments do not increase along with them, then something has to be cut. That something almost always impacts the maintenance and upkeep of the community or the size of its reserves for capital repairs. This is transparently foolish when one realizes that everything structural and mechanical requires more maintenance and repair as it gets older. To ignore this reality ultimately will cost the community more money than it will ever save. It will also diminish the appearance of the community and make it a less desirable place to live. That will adversely affect its resale value relative to nearby communities that are better maintained.

Budget Preparation Timetable

The larger the community's budget, the more time will be needed to properly develop it. Smaller communities may need less time, particularly if their budgets have a limited amount of detail. Quite apart from each community's time requirements are deadlines imposed by the community's governing documents. It is not uncommon for the bylaws to prescribe that the budget must be presented to the owners by a certain date for their consideration and comment prior to its final adoption by the board of directors. Some communities' bylaws actually require the budget be put to a vote of all the owners. Knowing and understanding a community's bylaws on budgeting may require consulting with a qualified and independent attorney.

For Maryland condominiums, there is an additional constraint imposed by the Maryland Condominium Act. Section 11-109.2 of the Act states a condominium budget must be submitted to the unit owners at least 30 days

prior to its adoption. Some condominium bylaws require the budget to be adopted at least 30 days prior to taking effect. This means the budget must be submitted to the unit owners at least 60 days prior to taking effect. The language of the Act and the language of the bylaws can, when compared to one another, appear to be overlapping or even contradictory. Condominium boards of directors are well advised to consult with their legal counsel to be sure their budget approval timetable meets the community's requirements as well as those of the Maryland Condominium Act.

In Montgomery County, however, *all* associations, and not just condominiums, must send their proposed budgets to their members at least 30 days before the meeting at which the proposed budget will be voted upon.

There are several important objectives to be accomplished during the budget development process. The budget preparation timetable should be centered on an orderly accomplishment of each of these objectives. The objectives are based on estimating the funding requirements for:

- committee activities and projects;
- capital improvement projects;
- replacement reserve;
- public utilities consumption;
- service contractors; and
- staff payroll.

Insisting all committees submit their **committee activities and projects** funding requests allows the board to review these proposals as part of the budget development process. Once the proposal list is trimmed down to those deemed "politically acceptable," the next step is to develop a general idea of the likely cost of each proposal. This can be done by obtaining an estimate from a vendor or contractor. Only one estimate is needed at this stage; the intent is to get a **general** idea of the likely cost, not to conduct competitive bidding. The latter should be done only when it is known the funds have been budgeted and the community is prepared to commit to a contract. With a general cost estimate for all the committee proposals in hand, the board can then prioritize, again without specifically committing to any individual project.

Often committee members seem oblivious to the budgetary realities of the community. Getting the committees involved in the budget development process enables them to realize that funding their pet proposal cannot be considered outside the overall budgetary needs of the community. Once the budget is developed, each committee can move forward focused on that which has been approved rather than wasting valuable time developing ideas that cannot be funded.

Capital improvement projects are designed to enhance or improve the

community rather than repair or maintain it. They should not be confused with replacement reserve projects. It is normal for a number of capital improvement projects to be on people's minds at the same time. The problem is one of timing. If the projects are not discussed until the budget year is underway, it is probably already too late to fund them. That is why a good budget development process includes lead time for sounding out everyone on which capital improvement projects are desired. Then they must be prioritized since it probably will not be possible to fund all of them at once. Prioritization is usually accomplished by a combination of comparing the likely cost of each project, as well as its true desirability. As you might imagine, the greater a project's likely cost, the more carefully it will be scrutinized to assess its real desirability.

The **replacement reserve** needs to be evaluated every year as part of the budget process. The primary question is whether any replacement reserve components are scheduled to be replaced during the coming budget year. If so, the transfer of those funds from the replacement reserve fund into the operating account and its eventual disbursement must be provided for in the budget. This is also an opportune time, perhaps even the best time, to take a look at all the components in the replacement reserve schedule with a view to answering two questions: Does the projected remaining life of each component still look plausible? Has any information been obtained that would cast doubt on the adequacy of the projected replacement cost? Sizable changes in the projected remaining life or the probable replacement cost of any item may alter the funding requirements of the reserve fund. That can also impact the budget.

As the percentage of the total budget devoted to **public utilities consumption** goes up, so does the need to develop a well thought out and rational projection of those costs for the coming budget year. Even when done properly, this can be one of the most difficult parts of the entire budget development process. It is not rocket science, but it is time-consuming, so planning ahead is essential if there is to be enough time.

Conversely, forecasting the probable annual costs of the **service contractors**, the firms that provide essential and predictable services--such as trash collection, security patrols, lawn mowing etc.--is one of the easiest portions of the process to complete. (That is, of course, if your service contractors respond quickly to your queries.) Once again, allowing some time takes the pressure off of them and you.

Finally, there is the matter of **staff payroll** projections. Not only can it be difficult to calculate the true cost of the payroll for the coming budget year, it is often wrapped up in politically sensitive discussions regarding how much of an increase and whether the benefits are adequate in today's job market. Some communities simply insert a lump sum into their budget and postpone facing these questions until the budget year is already underway. The problem with this approach is there will always be those who will view all the funds allotted in the budget as "spendable", without regard for whether there really is a need to spend

them. Getting these tough decisions out of the way as part of the budget process can take the pressure off the Board during the budget year.

Most serious budgeting mistakes are made in haste, the result of too little time for too many decisions. The thrust of such a detailed budget development process is to make as many of the spending decisions as possible as part of setting the annual budget priorities, and to do so with enough "lead time" to permit a deliberate evaluation of all the issues that need to be considered. It helps all concerned to confront all these questions at the same time and to realize that the community very likely cannot afford to do everything. Deciding these questions during the budget development process will allow the Board to concentrate on policy matters during the budget year rather than continually confronting new funding decisions.

V. PREPARING THE BUDGET

Establishing the Chart of Accounts

Preparing the actual budget begins with establishing the chart of accounts, making sure all those informed and educated estimates of future income and expenditures are organized into a logical arrangement. The chart of accounts is simply an organized grouping of the various categories into which all income and expense items will be distributed. While often overlooked, it is a good idea for the chart of accounts, indeed the very format of the budget, to look the same as the chart of accounts and format used in presenting the monthly or quarterly operating statement, also called the statement of income and expenses. Doing so simplifies comparisons of budget to actual during the year, as well as year-to-year comparisons in the presentation of the annual budget each year.

It is not absolutely necessary for every community to have its chart of accounts be finely detailed. Smaller communities with smaller budgets can justify simpler charts of accounts. As a general rule, the larger a community's budget becomes, the greater the need for precision in the chart of accounts so all concerned can see "where the money goes."

Whether large or small, general or detailed, every chart of accounts is divided into several broad groupings, each of which will contain two or more distinct accounts. These are referred to as "line items." The purpose of line item accounts is to segregate income and expense items so those who manage the community's finances can more easily see where the real problems are when actual financial performance deviates unacceptably from the budget that had been adopted.

Projecting Income

The real work in developing a budget begins with realistically projecting income. Of course, the largest part, **assessment income**, cannot be calculated until all of the other line item accounts, income and expense, have been calculated.

Nonetheless, most common ownership communities have at least a few other sources of income. Some of these line item income accounts are pretty obvious to just about everyone and need no explanation. However, there several income accounts often overlooked in budget presentations. The first is "**projected delinquencies.**" If a community never has any delinquencies, then it is unimportant to show this line item. However, if there are a significant number of delinquencies, then it becomes very important. After all, a budget must balance income and expenses. A budget that shows income equaling expenses in a community with significant delinquencies will obviously become unbalanced if the delinquencies are not included in the budget forecast.

Another often overlooked or incorrectly treated income line item is "**interest income.**" Some communities intend interest income to be used to offset operating expenses, thereby minimizing the need for assessment income. Other communities intend interest earned by the reserve funds to remain in the reserves. Either way, it is necessary for interest income to be shown in the budget because it will be shown on the monthly or quarterly operating statements. How does interest earned by the reserves remain in the reserves if it is shown as income on the operating statement? That will be covered under "Projecting Expenses: "Transfers to Reserve."

Yet another often overlooked income line item is "**transfers from reserve.**" When expenses are anticipated that will be paid from the reserve funds, those expenses will be shown as expenses on the operating statement, since all expenditures must appear there in one way or another. The only way to prevent those reserve expenditures from distorting the operating statement is by transferring funds equal to those expenditures from the reserve fund accounts into the operating income account. For that reason, both transfers from the reserve accounts and transfers to the reserve accounts should be shown in the budget.

Finally, it is important to identify and account for any "**special assessments**" being collected from the owners in the community. Special assessments should never be lumped in with regular assessments. Doing so only clouds the question of how much money is budgeted, and collected, for each type of assessment, and where the delinquencies may be.

Projecting Expenses

Operating expenses are normally separated into groupings of similar line item accounts for administrative, taxes and licenses, payroll, utilities, and maintenance expenses. All these, except maintenance, are fairly obvious and need no special explanation. However, since community management is fundamentally about maintenance, a community can often benefit from dividing its maintenance expenses into as many as three distinct groupings. If a community spends enough on maintenance, it will generally find it not only buys *staff supplies and equipment* for its own maintenance employees to use in doing their jobs, but will also enter

into annual *service contracts* as well as "as-needed" *repair contracts*. The former are part of an annual routine, and are highly predictable in nature and amount (trash removal, pool management, etc.). The latter are not specifically known before the actual need arises (for example, hiring a plumber to repair a broken water pipe). Segregating maintenance related expenses can give decision makers a better idea of where the money is going and whether increases can be controlled or even reduced. Ultimately, this kind of information can help the Board and/or management decide whether it's better to perform certain repairs with staff members or to out-source them to contractors. The actual chart of account for any particular community will vary, reflecting the community's individual needs and circumstances.

Administration expenses tend to be fairly predictable from year to year, unless a significant change is foreseen. If the community has its own on-site manager, it might be a good idea to separate and group those accounts for which the manager will be solely accountable from those that reflect the decisions of the Board of Directors.

Taxes and Licenses are also very predictable and do not tend to change significantly from year to year unless facilities are added that require licenses. That very rarely happens.

Payroll, if the community has employees of its own on site, can consist of a few accounts or several. It really depends on the number and types of employees a community has. A very small community with one manager, one engineer, and a couple of porters can justify grouping all their salaries into a single account. A very large community would do well to segregate salaries by employee type. Whichever method is used, you should create separate accounts for payroll taxes, insurance benefits, workmen's compensation premiums, and other benefits (such as bonuses, education benefits, etc.). Because they are payroll-related costs, it is preferable to include the premiums for health insurance and workmen's compensation under Payroll rather than to lump them in with the insurance premiums paid for the community's property insurance policies.

Calculating a payroll budget, while somewhat time-consuming, is not that difficult. The result can be a surprisingly accurate projection of future payroll costs. The challenge is to make sure every *foreseeable* cost is included. This is most easily accomplished by creating a spreadsheet with a line for each employee or position, then in each column across the page, insert:

Column 1 Current hourly pay rate
 Column 2 Average number of work hours per week (max. = 40)
 Column 3 Number of weeks employed per year
 Column 4 Base yearly pay (Col. 1 x Col. 2 x Col. 3)
 Column 5 Estimated number of overtime hours during the year

Column 6	Overtime pay rate ¹ (usually 150% of hourly rate for non-salary employees)
Column 7	Yearly overtime pay (Col. 5 x Col. 6)
Column 8	Projected current base pay (Col. 4 + Col. 7)
Column 9	Annual pay increase (x% x Col. 8) ²
Column 10	Estimated total projected yearly pay (Col. 8 + Col. 9)
Column 11	Employer's FICA contribution (6.2% of the first \$87,000 paid to each employee) ³
Column 12.....	Employer's Medicare contribution (1.45% of all salary paid to each employee) ³
Column 13	Federal unemployment insurance tax (6.2% of the first \$7,000 paid to each employee) ³
Column 14.....	State unemployment tax. (This percentage is limited to the first \$8,000 paid to each employee; the percentage itself will vary according to the employer's actual experience) ³
Column 15.....	Workmen's compensation premiums ⁴

The sums in Column 10 are assigned to the salary accounts and the totals for Columns 11 through 14 are assigned to their respective accounts. Similar calculations should be done for each employee receiving health insurance or other funded benefits. The totals are then assigned to those respective accounts in the Payroll grouping. As with any other part of the budget, accurate forecasts depend in large part on being realistic about what expenses are likely to be incurred. Forecasting a lower payroll based on staff reductions is not realistic if the vote to reduce to staff has not already been taken. Budgets should be based on existing conditions, not wishful thinking.

Utilities are, all too often, an area of the budget where numbers are just "snatched out of the air." As with payroll, forecasting utility costs may be time-consuming, but it is not all that difficult, and the results will be remarkably accurate when viewed over a period of years. It begins with locating the consumption history of each utility for the past several years. If yours is a new community, then your history is just beginning; use what is available. If yours is an older community, hopefully someone has been saving the old utility bills. If not, the utility company can provide a limited amount of prior history; it is better than nothing. The farther back your bills go, the better. However, recent history is most relevant.

¹ "Time and a half for overtime, unless other formulas are used. Do not forget to include hours assigned to provide coverage for other employees on vacation, etc.

² If pay increases are given other than on January 1st, it will be necessary to adjust the amount to reflect the fractional part of the year.

³ Based on 2003 standards (check with community auditor annually because these percentages and salary limits can and do change often).

⁴ Workmen's compensation premiums should be calculated by employee because clerical employees cost less to insure than employees who are expected to move around the community or work around machinery.

Be careful to take note of any significant changes that would have had a marked effect on consumption. For example, installation of water saving devices throughout the community would likely result in a sharp decline in water consumption. If so, then the consumption history prior to the installation should be discarded. To do otherwise will skew the averages higher.

Create a spreadsheet, not just for each utility, but for each separate meter, and assign one line for each year for which consumption data is available. Then:

- 1) In the twelve columns across the page insert the consumption amount for that month's bill. Quarterly bills should be inserted in their respective months.
- 2) The annual total should be inserted in the thirteenth column. Note that there really should not be significant variations in the annual totals unless some significant change has taken place that altered the prior consumption pattern.
- 3) Total and average each monthly column.

Assume these monthly averages will be representative of what your community's actual consumption will be in the coming budget year. It may, in fact, be quite different; but it is unlikely a better, more objective, forecasting tool can be found.

"Rates" are the basis for determining the amount your community will be charged on each utility bill. Rates tend to increase, often at unpredictable times and in unpredictable amounts. Nonetheless, a good budget requires an effort be made to forecast those increases. Do this by contacting each utility company's public affairs office and develop a friendly relationship with a contact person there. This contact person can only give you the company's official line ("We have submitted a request for an 8% increase next year"), but that's a starting point. Next, contact the Maryland Public Utilities Commission and see if they can give you some idea of what amount of increase is likely to be approved and when. It is uncommon for a public utility company to get the entire percentage it requests. Try to get a history of percentages requested vs. percentages granted. If the average percentage granted is half of that requested, then use that as the basis of your own calculations. Be sure to get some idea of when any increase is likely to take effect; it may be anywhere during your community's fiscal year. There is no point in calculating an increase for those months when the current rates will still apply.

The next step is to apply the formula the utility company uses in computing the bill to each of the monthly consumption averages. In the case of water and sewer charges, gas, and fuel oil, this will usually be very easy and uncomplicated. Where electricity is concerned, it is often very complicated. The formula is usually printed on each utility bill. Use that formula to calculate the amount of each month's or quarter's bill based on the monthly or quarterly consumption averages. The total for the year is the amount that should be inserted into the

budget.

There may be some owners who will challenge this methodology. It is, after all, still based on assumptions and guesses. The best way to squelch those critics is to challenge them to come up with a methodology of their own and to demonstrate its superiority. They will find that it's easier said than done.

As stated above, all **Maintenance Expenses** can be segregated into three general categories: service contracts, repair contracts, and staff supplies & equipment. Service contracts cover costs by outside contractors associated with known and predictable services, such as landscape maintenance or elevator maintenance. Repair contracts cover all repairs performed by outside contractors when the nature of those repairs cannot be precisely foreseen until they are actually required. Staff supplies & equipment covers the purchase of all supplies, tools, and equipment used by the community's own maintenance employees in the performance of their duties. Dividing maintenance expenses in this manner allows the community to better evaluate their maintenance alternatives as well as monitor where their maintenance dollars are really going.

Service Contracts are probably the easiest part of the budget to forecast. Contact the contractors and ask them when and how much of an increase in their contract you should anticipate. If you can actually get them to send a contract or a letter or fax committing them to these increases, so much the better. Of course, if there is a possibility of changing contractors, the problem becomes a little more difficult. If the reason for the change is dissatisfaction with the service provided, it may cost more for another contractor to commit to providing a satisfactory level of service. If this is the case, consider soliciting a proposal from one contractor and use that as the basis for the budget estimate. Additional proposals can be solicited when you are actually ready to make the switch.

Bear in mind these accounts should be used only for the contract charges. Some contractors may, in the course of their work, be asked to perform additional services not specified under their service contract. Those charges should be charged to an appropriate repair contracts account.

More than any other area of the budget, **Repair Contracts** calls for "guess-estimation." Once again, this second grouping of accounts under the general heading of Maintenance Expenses should be limited to expenses paid to outside contractors. You may know, from experience, that plumbing repairs will be needed, but there is no precise way to know what kind, how many, or what they will cost in every case. Start with the community's experience over the past few years, then add any known costs, such as the expected replacement of a pump or motor that really needs to be replaced.

Since this grouping of accounts is so difficult to "guess-estimate," one technique often used is to make sure the total for all the accounts in this grouping is as much

as was actually spent in the past year, then add a percentage to allow for inflating costs and increasing repair incidents. It may ultimately turn out that some line items will actually do better than budgeted while others do worse, but the bottom line for the grouping should be relatively close to the budgeted estimate.

The final grouping of accounts under the general heading of Maintenance Expenses is **Staff Supplies & Equipment**. These accounts should be used to record all expenses for materials, supplies, tools, and equipment used by the community's maintenance employees in the course of doing their jobs. There are two good reasons for tracking these expenses separately from contractor expenses. First, it is impossible to increase the size of the maintenance staff simply by adding dollars to the payroll budget. Each employee, to do his or her job, must be equipped with the various tools, parts, and supplies that are inherent to the job task. The second reason is to have a clear basis for deciding whether to have the community's own staff members perform the maintenance or to hire contractors. Clear delineation of these kinds of expenses takes away much of the guesswork in choosing between in-house staff versus out-sourcing.

Sometimes expenditures are planned for additions and improvements rather than maintenance and replacement reserve projects. **Capital Improvements** are tangible commodities, such as new (not replacement) furniture or shrubs purchased to upgrade the community. Placing such planned expenditures in a separate category is desirable because, from year to year, this category of accounts can vary considerably depending on how much money is available to how much the community wants to improve. If only a few small individual projects are planned, it is perfectly acceptable to group them together in one account. However, if there is more than one large dollar project being planned, creating separate accounts for each is a good idea. This will enable everyone to track actual expenses to what was budgeted.

Earlier, it was pointed out that all expenses, regardless of their nature, must appear in the statements of income and expenses. **Reserve Projects** is an account or a group of accounts that will be used to identify anticipated reserve outlays during the budget year. It would normally equal the amount shown as "Transfers from Reserves" under income, although it is possible it may be less with the difference made up by other income. As with "Capital Improvements," one account can be used if the total anticipated outlay is small. However, if more than one large dollar project is planned, separate accounts will facilitate all concerned in tracking actual expenses to those budgeted.

Last, but by no means least, is **Transfers to Reserve**. This single account displays the sum anticipated to be transferred from the regular assessments into the Replacement Reserve fund or accounts. As a general rule, this sum should equal the sum calculated from the most recent Replacement Reserve study and adjusted upwards or downwards to reflect over or under-funding of the Replacement Reserve. If it is intended that interest earned by the reserves remain

in the reserves, the amount of interest reflected in "Interest Income" should also be added to whatever other sums are planned for transfer to reserves.

An often-overlooked matter in replacement reserve funding is allowing for the effects of inflation. If your community's most recent reserve study was three years ago (and best practice is to have such a study done every three to five years), then the projected replacement costs of those items in the study are likely to have increased during the intervening period as a result of inflation. There are a number of ways to offset these increases, and a discussion of budgeting is not the appropriate place to discuss them. Suffice to say, the subject should be given some thought and the adjustment, if need be, factored into the Transfers to Reserve account.

V. RESERVE FUND ACTIVITY

The foregoing discusses the intricacies of preparing and presenting an "operating budget." However, what no operating budget does is illustrate the activity taking place in the Replacement Reserve fund. Owners are entitled to an accounting of that as well, and it is quite simple.

Exhibit 1 – Replacement Reserve Fund Activity

<u>Replacement Reserve Fund Activity:</u>	<u>Last year</u>	<u>This year</u>	<u>Next year</u>
Prior year end fund balance....	\$	\$	\$
<i>plus:</i> Transfers to Reserve	+		
<i>minus:</i> Transfers from Reserve	-		
Year end fund balance	=		

This simple display of income and outlays will quickly answer a great many of owners' questions about how the Replacement Reserve fund is doing.

VI. FIVE YEAR BUDGETS

It is a regrettable fact that nearly all common ownership community boards of directors plan their community's finances no more than a year ahead. Yet long term financial planning should be part of the budgeting process. Perhaps it is not often done because the usual reaction is, "How can you plan that far ahead?" Actually, it really is not that difficult to develop a five year budget once the annual operating budget has been completed. Five year budgets provide a good picture of how much of each year's assessment income will be consumed by essential, or "un-cutttable," spending. The remainder of the assessment income is then available for non-essential, or discretionary, spending, such as capital improvements. Providing this information to the owners, as well as to the Board, can give everyone an early warning of the likelihood of future assessment increases.

It is neither necessary nor advisable to present a five year budget by displaying all the line item accounts shown in the annual operating budget. Instead, the line items in a five year budget really need to be only the subtotals of each grouping of accounts, as shown below:

Exhibit 2 – Simple Budget Format

	<u>Next Year</u>	<u>N.Y.+1</u>	<u>N.Y.+2</u> <u>N.Y.+4</u>	<u>N.Y.+3</u>	
Assessment Income ..\$	\$		\$	\$	\$
Projected delinquencies					
Interest income					
Transfers from Reserves					
Specialassessments					
<i>Total income</i>	\$	\$	\$	\$	\$
\$					
Administration					
Taxes & licenses					
Payroll					
Utilities					
Service contracts					
Staff supplies & equipment					
Capital improvements					
Reserve projects					
Transfers to Reserves					
<i>Total expenses</i>	\$	\$	\$	\$	\$
Surplus or deficit	\$	\$	\$	\$	\$

The key, as with all budgets, is to be realistic about income and expenses. Begin by assuming the current assessment level will remain constant, since the object of a long-range budget is to get a long range view of needed increases in assessments. Assume all other income and expenses will still be present unless you know for a fact that one or more will "drop out."

If a particular income or expense item is known or can be reasonably assured to remain at the same cost level in each future year, then show it as such. But if the recent history of the community shows increases, then allow for future increases. How much? One method is to average the past recent increase percentages and apply that percentage to each successive year. Of course, if there is a service

contract that specifies the amount to be paid in future years, then those amounts should be shown accordingly.

VII. PRESENTATION AND FORMAT

The budget must be formatted for presentation to the owners. What it looks like can mean just as much as what it says. A well-formatted budget conveys a sense of authority and expertise; a poorly formatted budget calls into question the competence of those who prepared it, no matter how hard they may have labored in the process.

Exhibit 2 shows a sample format for presenting a budget. It presents the previous year that has been audited, the current year in budget, year-to-date, and projected year end amounts, and the next fiscal year. Also shown is a column of percentage changes between the current year's budget and the projected budget. Using this format from the very start of the budget development effort is advantageous. It provides everyone involved with a continuing visual reminder of all that needs to be done, as well as the opportunity to see each of the pieces as a part of a larger whole.

While this format can be assembled on a typewriter from handwritten worksheets, as well as on a computer using a word processor, assembling it on a computer by means of a spreadsheet program, such as Microsoft Excel, will greatly simplify the process of recalculating the totals each time a change is made. Creating the format, including the appropriate calculation formulas, also provides a ready starting point for the budgets in later years.

However, a spreadsheet with columns of dollar amounts is not, in and of itself, enough. Those numbers will result in questions being asked, such as: "What's included in this account?" "Why is there such a big difference between this year's amount in this account and next year's projection?" "How was this estimate calculated?" Such questions can be anticipated and answered in advance by means of a narrative description of each line item and how the projected budget amount was calculated. If there are significant differences between the past or current year and the upcoming budget year, those should also be explained in the narrative. The absence of a narrative description can appear to skeptics as evidence of something being hidden. On the other hand, a well written narrative description will make the budget look authoritative and convey the impression that not only was the budget carefully constructed, but that the board of directors is being pro-active in providing answers to those questions that can reasonably be anticipated.

CHAPTER 10

TRANSITION FROM DEVELOPER TO OWNER CONTROL

I. INTRODUCTION

The developer generally controls the Board until a certain portion of the units in the community are sold and conveyed. The Maryland Condominium Act provides that a meeting of the council of unit owners to elect a Board of Directors is to be held within sixty (60) days from the date that the units representing 50% of the votes of the condominium have been conveyed by the developer to members of the public for residential purposes. The condominium's Declaration or Bylaws can specify a lower percentage for this transition deadline and thus these documents need to be consulted to determine when this sixty period begins to run.

As for homeowners' associations, a meeting of the members of the association to elect a governing body is to be held within 60 days of the date that 75% of the total number of lots to be part of the development after all phases are complete are sold to members of the public for residential purposes. Like condominium associations, the homeowners' association's governing documents can specify a lower percentage for the commencement of the election deadline.

The developer's objectives in building the community can differ from the residents' goals, and thus conflicts can occur between the community and developer during the transition process. The process described below can facilitate the transition process.

II. PUBLIC OFFERING STATEMENTS AND COMMUNITY DOCUMENTS

A contract for the initial sale of a condominium unit to a member of the public is not enforceable by the seller unless the purchaser is given, on or before the time the contract is executed, a current public offering statement as amended and registered with the Secretary of State. As set forth in Section 11-126 of the Maryland Condominium Act, the contract must meet certain criteria, including notice in conspicuous type of the purchaser's right to receive the public offering statement and the purchaser's rescission rights, as well as the warranties to be provided by the developer.

Additionally, the public offering statement must contain certain items, including but not limited to:

- the proposed contract of sale
- declaration

- bylaws
- rules and regulations,
- proposed management and insurance contracts
- the condominium budget
- the floor plan of the unit and condominium plats
- a plain language statement of the condominium's policy and procedures for collecting assessments and handling delinquencies
- information about arrearages by the existing unit owners.

These documents, when executed and recorded (as necessary) create the community, define its boundaries, allocate maintenance and repair responsibilities, and, in essence, establish the governance of the community.

For example, the declaration and/or bylaws will address the rights and responsibilities of the council of unit owners, voting rights of unit owners, and the election and role of the Board. The documents will also delineate limited and common elements, the condominium's obligations regarding same (i.e. including maintenance), impose insurance obligations, and provide guidance as to many other matters.

The original owner should keep these documents for future reference. If the declaration or bylaws are amended, the owner will receive notice of this. When the original owner sells his or her unit, he or she will need to deliver a current set of documents, known generally as a condominium resale package, to the purchaser. The condominium's management company will assist the owner by preparing and providing such a package.

Disclosures are also required for the initial sale of a lot in a development containing more than twelve lots. Section 11B-105 of the Maryland Homeowners' Association Act (MHAA) provides that such contract to a member of the general public who intends to occupy or rent the lot for residential purposes will not be enforceable unless the purchaser is given certain disclosures within seven days of the date of entering into the contract. These disclosures include but are not limited to: data about the identity of the seller, a description of the property (including the minimum and maximum lots planned), the identification of contiguous property to be dedicated to public use, articles of incorporation, declarations and bylaws that will bind the purchaser, and budget and homeowners' association fee information.

The purchaser must also be notified of changes in mandatory fees and payments exceeding 10% of the amount previously stated and other substantial amendments to the disclosures, as well as notice, in a conspicuous type, that the sale is subject to the MHHA and that if information is not timely furnished rescission rights apply, and that there will be restrictions attendant to the use and nature of the property to be purchased. There is a slightly different law governing the disclosures to be given in the event of the resale of a lot within a development or

the initial sale of a lot in a development containing 12 or fewer lots.

III. DEVELOPER WARRANTIES

The developer provides unit or home owners with warranties for their property. Section 10-202 of the Real Property Article of the Annotated Code of Maryland addresses “express” warranties, which are written affirmations of fact or promises relating to the property which are part of the basis of the bargain between seller and buyer. These warranties should be described in and attached to the public offering statement. Additionally, there is an “implied warranty” (a warranty created by law) that, at the time of delivery, the improvements (that is, the structure) are: (i) free of faulty materials, (ii) constructed in accordance with sound engineering standards, (iii) contracted in a workmanlike manner, and (iv) fit for habitation (*See Real Property Article, Section 10-203*). The implied warranties do not apply to conditions that an inspection of the property would reveal to a reasonably diligent purchaser at the time the contract is executed. Further, neither the contract of sale nor the deed can exclude or modify these warranties unless the contract pertains to an improvement then completed.

In addition to these implied warranties, Section 11-131 provides for an implied warranty from a condominium developer to a unit owner for a period of one year. In accordance with that warranty, the developer is responsible for correcting defects in materials or workmanship in the construction of walls, ceiling, floors, and heating and air conditioning systems in the unit. There is also an implied warranty on common elements, including the roof and mechanical, electrical, and plumbing systems, and other structural elements that runs to the benefit of the council of unit owners. This warranty commences with the first transfer of a unit to a unit owner and extends for three years. Notice of a defect is to be given during the warranty period and suit for enforcement is to be brought within one year of the warranty period.

Section 11B-110 provides for additional implied (imposed by law) warranties for homeowner associations. The warranty commencement period and notice requirements for homeowners’ associations track the condominium requirements described above. As such, it is advisable for a unit owner and/or the governing association to identify construction and structural defects during the warranty period so that the developer can be notified to make corrections (*see Section VIII, below*).

IV. BONDS

Developers generally post bonds with the local authorities to make sure that community property and components that are used by the public meet local and state standards. Local building code, public works, utilities, and zoning officials typically inspect the property and release the bonds when they are satisfied that all requirements have been fulfilled.

Associations may attempt to gain leverage with developers to correct community property construction by working to delay a bond releases. Associations do not have the authority to withhold bond releases, but local authorities may be responsive if the community has significant unresolved concerns with a property.

V. MANAGEMENT TRANSITION

In the case of condominiums and larger homeowner associations, the developer usually retains a property manager to administer community business. The property manager works for the community association and thus, when the unit owners or community assume majority control of the Board, they can change management companies if dissatisfied with the performance of the developer's choice of managers.

During the build-out process, the developer may use building subcontractors to service and maintain the property. As the transition process proceeds, the Board needs to review service and maintenance contracts to make sure that all necessary work is covered, and that the firms doing the work are appropriate.

VI. DOCUMENTS AND FILES

The association needs to obtain from the developer all documents relevant to the design and operation of the property. Indeed, Section 11-132 of the Condominium Act provides that “Drawings, architectural plans, or other suitable documents, setting forth the necessary information for location, maintenance, and repair of all condominium facilities, to the extent that they exist, shall be turned over to the council of unit owners upon transfer of control by the developer.”

Drawings should encompass a complete set of all design drawings, including site plans, utility plans, building plans, and landscaping plans. Design specifications, which are detailed descriptions of the requirements for the various products used in construction, are often found in a bound volume separate from the plans.

Testing and inspection records are also helpful. During construction, independent firms test and inspect various components. Common examples are soils tests, fire alarm system test, concrete tests, and air balance tests. Copies of these test reports should be provided by the builder to the association.

Original or copies of permit inspections should also be part of the package to be tendered by a developer. Local building code authorities, or their designated independent inspection firms, inspect the building at various stages of construction. In some cases, the inspectors place certificates of approval on the equipment. An example is the stickers placed by electrical inspectors on the main breaker and disconnect panels.

Additional documents

Warranties on property components, to be secured by the Association are:

- Operating and maintenance manuals for equipment;
- Public Offering Statements and condominium documents;
- Budgets and reserve schedules; and
- Lists of unit or home owners and all file information on the units necessary to administer the community.

After the transition, the condominium or homeowners' association must keep proper books and records, as both the Condominium Act and the MHAA provide members with examination and inspection rights.

VII. COMMUNICATION WITH THE COMMUNITY

During the transition, it is essential that the Board keep the community advised of the status of negotiations with the developer. However, dissemination of sensitive information that could affect the negotiations should be tightly controlled.

Finding the proper balance between full disclosures to residents and withholding sensitive information that should not be seen by the developer can be challenging.

If counsel is retained, the Board must be careful not to waive the attorney-client privilege. For example, communication between the Board and its counsel is clearly privileged. However, if the Board disseminates this information, a claim could be made that the privilege was waived. Additionally, if third parties are present when counsel is consulted, a claim could be made that the communication was not privileged.

VIII. ASSESSMENT OF THE PROPERTY FOR CONSTRUCTION OR STRUCTURAL DEFECTS

Many defects do not become apparent immediately. As discussed before, it is best to wait until near the end of the statutory warranty period to perform a systematic assessment. It is advisable to distribute a structured questionnaire to residents before performing a systematic property assessment. Patterns of concern may become apparent when responses from a large group of residents are examined.

Most communities retain an engineer or building inspection firm to perform a systematic assessment of the property. This is not required by law or the community documents, but it is advisable to have professionals do an assessment since it requires special knowledge to evaluate complex building systems. Many critical systems are concealed and cannot be examined without cutting holes in finishes, or demolishing parts of a building. Examples include: piping and wiring

inside walls and ceilings, exterior wall flashing behind the cladding, waterproofing under pavement or landscaping, buried piping, pipes and wiring buried in insulation in attics, and structural components concealed by finishes. In assessing these items, common practice is to search for indications of problems with concealed components. If there is sufficient reason to suspect that there are concealed defects, cutting exploratory openings may be warranted. Otherwise, significant costs could be incurred and funds wasted in cutting open walls and ceilings in a random manner looking for problems.

Testing equipment and systems should be done as a building is commissioned. The building engineer should participate in this process since it can take a long time to completely test complex building systems. The legal authority of an association's physical assessment extends only to common element components. The condominium documents define these components. Some concerns may involve a combination of common and unit owner elements. For example, in buildings with central plants that provide hot or chilled water, it is possible for improper operation to be the result of a defect in the central plant, piping, terminal devices, or a combination. It is important to identify the physical problems first, and then assign responsibility for repairs.

An independent design review of a property is not a normal part of a transition study because it would be time consuming and costly for a consultant to check all of the design assumptions and details in a property. If a complete set of design drawings is available, they normally contain sufficient information for an independent consultant to assess the adequacy of important components. Most design drawing sets contain a detailed listing of the general building code criteria that were used to design the building. Many drawings contain detailed assessments and/or calculations of items required by local jurisdictions for code compliance.

Replacement Reserves (*see Chapter 6*)

It is cost effective to incorporate a reserve study with a transition study since they both involve many of the same tasks. Developers may underestimate an appropriate level of reserve contributions. Underestimation may not be the result of a deliberate effort to understate reserve assessments, but may instead reflect a fundamental difference in point of view between builders, who focus on new construction, and property managers, who maintain existing facilities. A developer may believe that the cost to replace a component is about the same as the original construction cost. However, in some cases, it is more costly to replace components in occupied buildings since contractors must work around the residents, and old components must usually be demolished or removed first.

IX. NEGOTIATIONS AND RESOLUTION OF DISPUTES WITH THE DEVELOPER

After a list of alleged defects is compiled, the Board should negotiate with the developer to have the defects corrected. If the defects are minimal, there may be no disputes and the developer will promptly correct the problems. If the list of defects is disputed by the developer, there are a variety of conflict resolution methods available. Many communities retain attorneys to assist with the negotiations.

Available options include the following:

1. **Informal negotiations.** The Board, developer, their attorneys, and professional inspectors work together to come to an agreement about the items to be corrected and the method of correction. This is the most common method of handling transition disputes.

2. **Mediation.** An independent third party is engaged to help the parties reach a resolution.

3. **Litigation.** An association can bring a lawsuit to compel the developer to correct defects. Preparation for litigation is very costly and there are no guarantees that the association will prevail or recover the cost of litigation. This method should only be employed when the cost to correct defects is high, thus justifying the expense of counsel, and the parties cannot reach agreement through the other two methods.

4. **Arbitration.** An independent third party is retained to adjudicate the matter. The benefit of arbitration is that it is usually a quicker and less expensive adjudication than a trial. Rights of appeal from arbitration are usually limited. A detriment of arbitration is often a limit on discovery, which inhibits a party's opportunity to "discover" the other party's case. Governing and contract documents must be examined to see if the parties are obligated to prior to final hearing pursue arbitration in lieu of litigation.

The Association should be aware that the CCOC does not have the legal authority to intervene in disputes between Associations and their developers. It is therefore even more important that associations do everything reasonably possible to safeguard their own interests.

CHAPTER 11 INSURANCE

by Robin Manougian, Agent, CIRMS

GETTING STARTED

There are any number and types of insurance policies that go into making up a community association's insurance program, and how your community's program is to be written is specific to your specific exposures and coverage needs. Most Boards of Directors will have the benefit of either coming into an existing community where insurance has been in place for some time, or in which the Board is transitioning from developer control and the developer has already placed insurance. Whether your community has a long-established insurance program or you need to make certain the coverages written are keeping up with an ever-changing insurance climate and the possible coverage-change needs of your Association, the Board's first step is to select an insurance agent who specializes in community association insurance. While there are many insurance agents in Maryland, few are qualified to truly understand the intricacies of community associations. The website for the Washington Metropolitan Chapter of the Community Associations Institute (WMCCAI) (www.caids.org) includes a service directory of agents that service Montgomery County.

There are three (3) places your agent should initially review when crafting an insurance program for a community association: the Association's governing documents, including the bylaws and declarations, the various statutory Acts in Maryland (Condominium, Homeowners', and Cooperative Acts), and the lending requirements (which change periodically). These instruments should be followed closely to ensure that the policies provided are written properly and the Board is upholding its fiduciary and legal duty for the purchase of insurance.

For the purposes of this chapter, we will focus on insurance for condominium associations, but the programs written for cooperative associations can be very similar. Homeowners' Associations, too, have insurance requirements for the common area property and liability exposures and your agent can assist your community in writing a well-crafted insurance program that addresses your specific needs.

The Maryland Condominium Act

Maryland is recognized nationwide as having well-written statutory insurance provisions within its Condominium Act, however, that was not always the case. A landmark Court of Appeals case in 2008, *Anderson v. The Gables on Tuckerman*, threatened to rewrite the intent of the insurance provision within the Act when the consolidated cases originally filed by two Maryland condominium associations over insurance responsibility for damage that was confined to one unit, ended with a surprising decision by Maryland's highest Court that condominium associations bear no responsibility to insure losses that happen within an owner's unit. Surprising,

because since 1982 (when the Maryland Condominium Act was first enacted), insurance coverage was intended to provide coverage to condominium units as they were originally conveyed by the developer, including original-grade floor, ceiling, and wall coverings, as well as cabinets, counters, appliances, and fixtures; following a loss, those things were to be repaired or replaced with like kind and quality.

The appellate court's ruling, then, sent Maryland insurance agents scrambling to ensure that Master Policy carriers would continue to provide the same level of insurance coverage that Boards of Directors and unit owners had come to rely on prior to the decision, while the various state lobbies, particularly the Maryland Legislative Action Committee (MD-LAC), the Maryland Chapter of the national Community Association Institute lobbying group, worked to reinstate the original intent of §11-114 (a) (1), the property insurance provision in the Maryland Condominium Act. Less than a year later, on June 01, 2009, the Court's ruling was reversed through emergency legislation in the Maryland General Assembly, reasserting that Maryland condominiums – including units – are to be insured as originally conveyed, absent improvements, betterments, and alterations made by unit owners other than the developer.

Single Entity Coverage

Because of the upheaval of the law, many Boards, unit owners, and management companies want to know exactly what is covered by the Association's Master Policy. At time of loss, Maryland law requires that a unit be insured as it was originally conveyed. In other words, a repaired/replaced unit is to be repaired or replaced to original specifications: original/developer- grade floor, ceiling, and wall coverings (paint), as well as original/developer-grade cabinets, counters, appliances, and fixtures. Any improvements, betterments, and/or alterations an owner makes or acquires from a previous owner are to be insured under an owner's HO-6/condominium unit owners' policy. The law does not require the association to provide insurance for the unit owner's personal property (rugs, furniture, etc.). That said, it's important to note:

- Lenders, notwithstanding Maryland's statutory provision, may require "Walls In" or what the insurance industry refers to as "All In" or All-Inclusive coverage. All In coverage also insures the improvements, betterments, and alterations owners (previous and current) make to a unit. Because most governing documents in Maryland do not require All In coverage, if the Master Policy does not provide it, a lender may require a borrower (for a new purchase or refinance) to also purchase HO-6/condominium unit owner's Dwelling coverage in an amount equal to 20 percent of the appraised value.
- Some carriers may be willing to provide All In coverage as an enhancement or at the Board's request, but before asking for such a coverage increase, it's important to be aware that the valuation of the property may increase as a result, which will also have an impact on premium. In addition, not all owners in a given community will have made significant or possibly any improvements to a unit. At time of loss, All In coverage will not improve a unit that still has original specification appointments, but it will rebuild the improvements and betterments for those that have them. To control costs and make owners responsible for insuring their units as needed, Associations in Montgomery County have generally allowed the governing documents to dictate coverage, regardless of what the lending community requires.

With that background, as the Board of Directors of a community association shops for insurance, it is important to understand the components of a well-written insurance program:

I. Property Coverage:

Property Coverage is written to insure for direct, physical loss an Association's common area structures, building structures, and business personal property. Most condominium association programs, unless limited by availability in the market (usually due to poor loss histories) are written on a "Special Form" basis, which is sometimes also referred to as "All Risk" coverage. "All Risk" is a bit of a misnomer given that the list of exclusions in a commercial property policy can be numerous, but the policy form is still very broad in that it includes all perils except for those that are specifically excluded in the policy exclusions.

A few common exclusions include:

- Ordinance of Law (which can and should be added via endorsement)
- Earthquake (may be available via endorsement)
- Flood (may be available via endorsement or through stand-alone policies)*
- Power Failure
- Neglect
- War
- Nuclear Hazard
- Intentional Acts
- Construction Defects
- *Wear, Tear, Age, Lack of Maintenance* (though insurance may pay to repair resulting damage)

(* Buildings located in a special flood hazard zone (A or V) require flood coverage written on an RCBAP (Residential Condominium Building Association Policy) through a National Flood Insurance Program (NFIP) carrier.)

Losses, too, that are not the result of direct, physical loss, or that are sudden and accidental in nature, may also not be covered. A loss adjuster can determine many things including the proximate cause of loss and point of origination.

Make certain to read your policy carefully. Some property, such as outdoor/landscaped property (plants, trees, shrubs, lawns), is limited to named perils coverage, specifically fire, lightning, explosion, riot or civil commotion, and aircraft or vehicular damage; some carriers may also include vandalism/malicious mischief and theft coverage for live property.

Property coverage can be written in a variety of ways and the age and condition of the property, as well as the availability of coverage with any given carrier, will determine the insuring agreement:

- 1) **Actual Cash Value:** The policy pays the replacement cost of the structure less depreciation due to wear and tear. This valuation method should be avoided.

- 2) **Replacement Cost:** Provides for the cost to replace the damaged property – up to the policy limit shown on the declarations – with materials of like kind and quality and without any deduction for depreciation.
- 3) **Extended Replacement Cost:** The policy will an additional specified percentage over an insured's policy limit in order to fully replace a damaged structure. This percentage is often shown as 120, 125, and even 150 percent of the stated limit of coverage. This coverage enhancement can become very important when there is a sudden spike in construction costs that could push rebuilding costs higher than expected.
- 4) **Guaranteed Replacement Cost:** The most comprehensive of valuation methods, this policy will pay for the necessary amount to rebuild or restore the structure, regardless of the replacement value used for rating purposes. Not all carriers write this form of coverage, but when available and if the insured is eligible, it removes the question, “do we have enough?” particularly since Maryland is not a state that currently requires regular certified appraisals.
- 5) **Functional Replacement Cost:** This is the cost of acquiring another item of property that will perform the same function with equal efficiency, even if it is not identical to the property being replaced. Functional Replacement Cost coverage is commonly used when insuring historic buildings where the materials used to build the original structure are no longer available or would be prohibitively expensive to acquire for replacement purposes.

Boards and management should make sure that when reviewing a proposal or policy that the Property coverage is written on a Blanket, Agreed Value basis and waives any co-insurance. These terms mean:

Blanket Coverage allows for the full limit of the policy to be used for any given loss. In other words, if an association has five buildings insured at \$3,000,000 each, the entire \$15,000,000 would be available for any given loss and coverage would not be limited to the scheduled amount of each building. The same holds true per building. If a building is valued at \$3,000,000 and there are 10 units in the building and only five are damaged in a covered loss, the five units have benefit of the entire limit.

Co-Insurance is a property insurance provision that penalizes the insured's loss recovery if the limit of insurance purchased by the insured is not at least equal to a specified percentage (commonly 80 percent, but sometimes 100 percent) of the value of the insured property. For condominium insurance policies, it is possible to waive co-insurance with the use of an Agreed Value provision.

Agreed Value/Agreed Amount Coverage: Policies written on an Agreed Value basis suspend any Co-Insurance requirement. Not only is it important that insureds and agents review building limits annually, but those limits should be written on an Agreed Value basis. To achieve this, a carrier may require a statement of values signed by the Board.

Deductibles

Property losses in the current market place usually are subject to a deductible of \$5,000 per occurrence, but smaller communities may be able to negotiate lower deductibles of \$2,500 and even \$1,000. Communities with loss frequency issues, however, may find their policies subject to higher deductibles, particularly for water damage which is a common cause of loss in condominium associations. Water damage deductibles of \$10,000, \$25,000, and \$50,000 are not unheard of and are applied by carriers to keep the insurance program viable and priced competitively, but also as incentive for associations to take responsibility for effecting repairs for maintenance conditions that give rise to claims.

Property losses are adjusted per occurrence, which means a loss that happens in one, 24-hour period (i.e., if a storm happens on June 24th and causes damage, and then another storm occurs June 30, the losses are adjusted as separate occurrences subject to two different deductibles). Using the same storm example, a single storm can affect several units or even several buildings, and as long as the storm is the same single occurrence, the loss is adjusted as one loss subject to one deductible. (Associations that are within five miles of the eastern shore or a water/wind source may have separate wind deductibles applied. These deductibles are usually a percentage of each building's replacement value, typically 1% or 2%. If your community has a separate wind deductible, it is important to discuss your financial responsibilities following loss as underfunded communities may have difficulty paying these higher deductibles.) Check with your accounting firm about the tax ramifications of opening a savings or reserve account specifically for the purpose of funding deductibles.

Associations with specific types of frequency or loss problems may have policies with per-unit deductibles as well as split deductibles: a higher deductible that addresses the frequency issue and another for all other covered causes of loss. This is commonly seen in associations that still have polybutylene pipes, a gray or light blue plastic pipe that was manufactured by Shell Oil Corp. and used by builders in the late 1980s and early 1990s; additives in the water cause the pipes to deteriorate over time resulting in breaks, particularly at the joints. A class-action suit resulted, and for those Associations (and single family home owners) that participated, some relief was available for plumbing replacement.

There are many Associations in existence today that still have polybutylene pipes, many of which have sustained expensive claims and now have either prohibitively high water damage deductibles or no coverage for this peril at all. The mere existence of polybutylene pipes can create an ineligibility issue with many carriers and make shopping for insurance much more difficult.

Can an Association Make Repairs to a Unit in Spite of the Owner's Refusal?

First, it's important to review the Association's abilities regarding right of entry. Maryland passed (effective October 1, 2012) a right of entry bill that authorizes a council of unit owners or a condominium's authorized designee the right to enter a condominium unit to investigate any damage. The law expands the previous law that allowed a council of unit owners or designee the right to enter a unit only to repair the unit. Maryland law already allowed a condominium to enter a unit to make repairs when the repairs were necessary to prevent damage to other units or to the common elements.

Second, review what your Association's documents will allow. In the case of the Associations that have polybutylene pipes, or buildings that see frequency/severity issues involving aging water heaters and burst washing machine hoses, or other exposures, managers and Boards commonly cite an inability to effect or force repairs or changes within a unit, even for the purpose of reducing loss or damage. The answer to being able to enforce repairs and maintenance may well be within an association's own governing documents, but always seek the advice of counsel prior to enforcing any change.

Deductible Responsibility

Along with reinstating unit owner coverage in 2009, Maryland also successfully passed a new state law that creates an automatic shift of the Master Policy deductible – up to \$5,000 – to the unit owner when a loss originates within the unit. Maryland was the first state to pass such a measure, and in doing so helped to lift a financial burden from associations to have to fund potentially numerous deductibles during any given policy term. Among the best things about the deductible shift is the absence of a need to prove negligence, which is often difficult, and places the Board and community management firm in the uncomfortable position of assigning blame to neighbors. Instead, the law is based purely on point of origination. It is the legal obligation for the Board to remind owners of this responsibility annually.

Boards of Directors and management, however, must be careful not to assign deductible responsibility for losses that originate outside the unit or through a common element or limited common element; the deductible for losses that originate outside of the units is to be handled as a common expense by the association. The Condominium Act states:

§11-114. Required insurance coverage; reconstruction

(2) (i) 1. *The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense.*

2. *A property insurance deductible is not a cost of repair or replacement in excess of insurance proceeds.*

(ii) *If the cause of any damage to or destruction of any portion of the condominium originates from the common elements, the council of unit owners' property insurance deductible is a common expense.*

(iii) 1. *If the cause of any damage to or destruction of any portion of the condominium originates from the unit, the owner of the unit where the cause of the damage or destruction originated is responsible for the council of unit owners' property insurance deductible not to exceed \$5,000.*

2. *The council of unit owners shall inform each unit owner annually in writing of:*

a. *The unit owner's responsibility for the council of unit owners' property insurance deductible; and*

b. *The amount of the deductible.*

3. *The council of unit owners' property insurance deductible amount exceeding the \$5,000 responsibility of the unit owner is a common expense.*

Contact your community association attorney if you are unsure about who is responsible for paying the deductible.

Equipment Breakdown/Boiler and Machinery Coverage

The traditional use of the words “boiler and machinery” to define this coverage can be misleading. While older associations may have boiler systems for heating, cooling, and water supplies, the modern use of the term “equipment breakdown” better represents loss due to mechanical or electrical breakdown of nearly any type of equipment. Coverage applies to the cost to repair or replace the equipment and any other property damaged by the equipment breakdown. Resulting business income and extra expense loss is often covered as well. *Causes of loss do not include breakdown or failure of equipment due to wear/tear/age/lack of maintenance.*

Business Income and Extra Expense

This coverage form pays for additional costs in excess of normal operating expenses that the Association might incur following a loss and would need to continue operations while the property is being repaired or replaced after having been damaged by a covered cause of loss. Extra expense coverage can be purchased in addition to or instead of business income coverage, depending upon the needs of the organization. Business Income limits can be based on the gross assessments for the year, but it's important to note that following a loss, even if an owner(s) is displaced for a period of time, along with continuation of the mortgage payment by the owner(s), condominium fees also remain due.

Building Ordinance

A necessary component of a condominium association's policy is building ordinance protection. This is coverage for loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Following a covered loss, older building structures that are damaged may need to upgrade to current code certain components within the building including electrical, heating, ventilation, and air-conditioning (HVAC); roofing materials, plumbing, fencing, sprinkler systems, etc., and even “green” or energy efficiency codes. Typically building ordinance coverage is triggered when a building has sustained catastrophic damage and 50 percent or more of the building must be demolished and rebuilt in accordance with current building codes rather than simply repaired.

Building Ordinance or Law Coverage includes three parts:

Coverage A/Building Laws Coverage: Coverage for the undamaged part of the building. The property insurance policy only protects you against actual damage caused by a covered cause of loss to a building; it does not cover the cost to replace an undamaged portion of

your building that is required to be torn down and rebuilt because of a local ordinance. Ordinance or Law, Part A provides this protection based on the coverage limit you select.

Coverage B/Demolition Costs: The Property policy will not cover demolition expenses for an undamaged portion of a building that has to be removed to meet current code. Coverage B provides this coverage. Building size, the number of buildings, location, and other factors can increase demolition costs and should be taken into consideration when selecting a coverage limit.

Coverage C/Increased Cost of Construction: When determining how much it might cost to bring a building up to current code in the event of a very large loss, it's important to consider the age of the building and the types of upgrades that might be required by current code, including sprinklers, alarms, wiring, plumbing, septic system, elevators, etc.. A qualified contractor can help determine costs so that you can make an informed decision regarding a coverage limit.

Finally, the basic Property Coverage language of many carriers' policies can be the same. Coverage enhancements and the ability to include those enhancements is what sets carriers and their programs apart. Don't assume any two carriers' programs are equal, and never judge an insurance program on premium alone. Much lower premiums should be viewed with some measure of scrutiny.

II. Commercial General Liability Coverage: This coverage form protects associations against liability claims for Bodily Injury (BI) and Property Damage (PD) arising out of premises, operations, products, and completed operations, as well as advertising legal and personal injury (PI) liability. Examples of a General Liability claim can be a slip and fall in the common area or grounds of the association's complex, or a garage door that malfunctions and damages an owner's car as it enters the garage. General Liability policies can be subject to no deductible or can include a deductible.

It is important to note that an association's General Liability coverage will not reach inside an owner's unit, therefore, owners should carry a well-written HO-6/condominium unit owners' policy that will respond to injuries that happen within the unit walls.

The best way to reduce the chance of loss is to maintain the community through regular housekeeping and risk management: maintain the building(s), keep walking surfaces smooth and as free as possible from trip and fall hazards, alert owners to wet flooring that may either have been recently cleaned or is wet due to weather conditions, and any other issues specific to your building(s) that could lead to unintended injury. Montgomery County, too, has stringent snow removal policies. Aside from avoiding county penalties, shoveled walkways also help to avoid injuries and lawsuits. See:

<http://www6.montgomerycountymd.gov/mcgtmpl.asp?url=/content/pio/news/snow.asp>

Typical limits of a Commercial General Liability policy include:

\$ 2,000,000.	Each occurrence, Bodily Injury, Property Damage, Personal and Advertising Injury
\$ 3,000,000.	General Aggregate, per location Bodily Injury, Property Damage, Personal and Advertising Injury
\$ 3,000,000.	Products/Completed Operations Aggregate
\$ 2,000,000.	Non-owned and Hired Automobile Liability (optional, recommended)**
\$ 100,000.*	Premises Rented to You (formerly Fire Damage Legal Liability)
\$ 5,000.*	Medical Payments (any one person)

* These limits may be higher depending on the insuring company.

** Non-owned and hired automobile liability coverage is written to protect associations where Board and/or committee members and volunteers use their personal vehicles for association business (errands). While the individual's own auto policy is primary, if the Association is also named in a suit in an at-fault accident, this coverage form will pay to defend the Association. This coverage is included in the Business/Commercial Auto policy when the Association owns service vehicles.

Garage Keepers Legal Liability coverage can be added to an insured's policy when the association allows others (typically a valet or porter) to park an owner's or guest's car. While collision damage that happens inside a garage would be a claim that an owner would normally file with his/her own liability carrier, when a valet causes such damage while the car is in his care, custody, and control, the Association (and the valet service if the service is contracted) assumes liability. Limits should be calculated based on the value of the cars under the valet's control at any given time.

Party Room/Clubhouse Amenities

For communities that have amenities such as party rooms and clubhouses, it's important to note your special exposures:

1) Make sure that your policy includes host liquor liability coverage. This is liability for bodily injury (BI) and property damage (PD) arising out of the serving or distribution of alcoholic beverages by a party not engaged in this activity as a business enterprise. For host liquor liability coverage to apply, it is important that you not sell alcoholic beverages, but instead simply serve them as part of a social affair or include, for example, two drinks in the cost of an event ticket such a holiday function or picnic. Make sure your policy does not include exclusionary language for hosted events where providing (but not selling) alcohol requires you to provide a one-day liquor license.

2) If you rent or allow owners to use the association's facilities for private functions, make sure that the host obtains a one-day event rider to their homeowner's policy naming the association as an additional insured.

3) Understand the limitations of your policies. Large-scale community associations in Montgomery County hold special events throughout the year including fall/harvest and wine festivals, Halloween parades, summer events, and other similar-type events that may not be covered under the Master Policy, particularly if those events include liquor sales, hayrides, moon bounces (inflatables), pyrotechnics (fireworks), and rock climbing walls. Very often such events will require the purchase of one-day event policies. Be sure to consider the cost of insurance when planning events and allow enough time for your agent to shop the specialty markets for stand-alone coverages.

Service Providers and Certificates of Insurance

As a matter of course, Associations typically operate on a zero budget, which means many of the services a typical community association uses – grounds maintenance, snow removal, painting, electrical, plumbing, etc. – is subcontracted out to specialized service providers. When hiring a service provider, make certain to:

1) Hire only reputable, licensed, bonded, and insured providers. The insurance a service provider carries should include General Liability and Workers Compensation. Make sure the provider shows evidence of current insurance via a certificate of insurance. The certificate should name the Association as an additional insured – not just as a certificate holder.

2) Make it a part of the Association's rules and regulations that when owners hire work to be done in their units (or for move-in/move-out services) that they are also contracting with licensed, insured contractors. If an insured contractor causes damage in a unit or in the common areas, the owner and/or the Association can seek recovery of the loss through the contractor's policy. Uninsured contractors, either for a unit owner or the Association, may not have the means to pay for losses they cause, which will result in a paid loss against the Association's policy through no fault of its own.

3) When signing contracts for major repair work, make sure to read the fine print. Some AIA (American Institute of Architects) contracts, used frequently when an Association contracts a large repair/replacement/addition project, include language that require the Association to indemnify/hold harmless any damage that a contractor causes. In order to protect the Association and its insurance company, this language should be stricken entirely.

III. Directors and Officers Liability Coverage: A Directors and Officers Liability policy is written to defend an Association's board of directors from "wrongful acts" or failure to act. These

policies are non-standard (meaning each carrier sets the parameters for how broad their policy form will be and the insuring agreements and exclusions contained therein). When shopping for Directors and Officers Liability policies, remember that you get what you pay for; policies imbedded within a Master Policy may have much lower premiums but are likely to include exclusions that can leave the Association vulnerable at time of loss. Coverage enhancements to look for are:

- 1) A broad definition of who is a named insured, including past, present, and newly appointed board members, committee members, and volunteers.
- 2) The management company as an additional insured; the management agreement you sign with a management company usually includes an indemnification agreement whereby if your management company is sued alongside the association, the management company will expect that their defense in such suits is covered by the Association. Including your management company as an additional insured funds their defense as well as that of the Association.
- 3) The developer as an additional insured as long as the developer occupies even one board seat.
- 4) Employment Practices Liability; this coverage enhancement protects the board for allegations of discrimination, wrongful termination, failure to hire, and workplace and sexual harassment. Full prior acts coverage. While the vast majority of Directors and Officers Liability policies are written on a claims-made basis (claims must be reported in the same policy year in which the Board is made aware a situation exists that could give rise to a claim), prior acts coverage allows a claim to be filed that may have happened several years ago but for which the Board was only recently made aware.
- 5) Non-monetary as well as monetary claims coverage; not all claims are about money. Many complaints, in fact, are because the claimant simply wants a community policy change or to be allowed to do something the Board has restricted him/her for doing (for example, to add a swimming pool or glass conservatory to his home, when the association has refused permission for such changes). These types of claims still result in defense costs and if your D&O policy does not include nonmonetary defense coverage the defense of the claim could be an out-of-pocket expense for the association.

IV. Umbrella Liability Coverage: Umbrellas provide additional limits of liability-based coverage that when written properly fit over the Association's Commercial General Liability, Directors and Officers Liability, Business Automobile, and Workers Compensation policies, in the event the limits of these policies are exhausted by claims. Umbrella limits are offered as low as \$1,000,000 and as high as \$50,000,000 or greater depending on the Association and its exposures. When selecting an Umbrella limit, the Board should weigh the following criteria:

- 1) How large is our association (unit count)?
- 2) Do we have any amenities/exposures that should we have a liability loss could result in a high settlement or award such as a pool, rock climbing wall, athletic courts/fields, tot

- lots/playgrounds, gated entry systems, etc.?
- 3) Do we have employees?
 - 4) Do we have any owned automobiles or service vehicles?
 - 5) Do we offer a shuttle service wherein we are responsible for transporting residents and guests?
 - 6) Do we have any water exposures such as a lake or pond?
 - 7) Do we hold social or special events?
 - 8) Do we have any unusual exposures?
 - 9) Do the common areas allow egress by the general public?

Your insurance agent in all likelihood will not tell you how much Umbrella coverage to carry; instead, agents recommend you carry as much Umbrella Liability coverage as the Association's budget will allow and that will also allow the Board and its residents a high degree of comfort that the Association is protected in the event of a high-dollar liability claim. When shopping for an Umbrella, make sure to ask:

- 1) Does the Umbrella have a self-insured retention/SIR (deductible)? There are many Umbrellas available on the market today that have no SIR which allows for first-dollar defense in the event any of the underlying liability coverages are exhausted; other Umbrellas may include a \$10,000 SIR. Is the Umbrella "follow form" (in other words, is it written subject to all of the terms and conditions of the policies it is designed to fit over)? In the event of a conflict, it is the underlying policy provisions that take precedence.
- 2) Make sure you understand what your Umbrella policy will not do. Specialized policies such as swim team liability or single-day event policies probably will not be covered by your Umbrella and may require the purchase of a separate Umbrella.

V. Employee Dishonesty/Crime (Fidelity) Coverage

Unfortunately, Maryland and the Washington Metropolitan area are no strangers to theft of community association funds. Thefts increase, not surprisingly, during a tough economy or when the perpetrator has financial and/or personal problems and they view an Association's funds as a temporary or permanent solution. While some thefts may go undetected for months or years, by and large the individuals responsible are eventually caught, but if the Associations from which he/she steals are not properly insured, the money may be lost.

Fidelity/Crime coverage is written to protect Association funds in the care, custody, and control of the Board of Directors and any employees and/or volunteers who have access to community funds. It is important, too, that if you have a management company or use an outside bookkeeping service to also make certain that this policy extends to those entities and/or individuals.

Maryland's statutory requirement is among the most broad nationwide; the law requires that associations with four (4) or more units carry a limit equal to three (3) months' worth of the gross annual assessments plus 100% of the total held in all investments, and while Maryland's

law currently caps that formula at \$3,000,000, Boards should closely scrutinize the individual needs of their association, including:

- 1) Whether the association's bylaws require a greater limit than the statutory cap.
- 2) Lenders, particularly the Federal Housing Authority (FHA) require the full formula, regardless of Maryland's cap. If you are seeking FHA approval, your limit will need to be calculated using their full formula requirement.
- 3) While Boards of Directors should not relinquish complete account control to any individual(s) or entity (bookkeeper, community manager, or one or two board members), the limit you carry should be commensurate with the financial controls in place, including:
 - Maintaining separate operating and reserve accounts.
 - Not allowing your association's funds to be co-mingled with those of any other association.
 - Making certain you have a dual-signature requirement on all checks drawn above a certain limit.
 - Making sure all checks written are for budgeted expenses. Non-budgeted expenses should require two signatures.
 - Requiring that all checks drawn from the reserve account should require two signatures.
 - Requiring that the person who has signatory authority should not be the same person who makes deposits and withdrawals.
 - Making sure that if monthly bank statements are mailed directly to the management company that a board representative receives a duplicate copy.
 - Reviewing online banking accounts; making sure the information agrees with the monthly balance sheet that the Board receives.

VI. Workers Compensation

Associations that maintain even one association-responsible (W-2) employee are required to carry adequate limits of Workers Compensation coverage. The Workers Compensation policy provides by an employer to an employee no-fault statutory benefits in the event of a job-related injury (including death) resulting from an accident or occupational disease. There are two sections to a Workers Compensation policy:

Part One of the policy covers the employer's statutory liabilities under workers compensation laws:

1. For the payment of the cost of medical care.
2. For loss of wages due the employee while he/she is unable to work due to an injury sustained on the job.
3. Benefits to survivors in the event the employee is killed on the job.

Part Two protects the employer against lawsuits brought against the Association by the injured employee or the survivor of the employee. If an employer is thought to be grossly negligent in the cause of the injury, the employer (the Association) runs the risk of being sued for that negligence. Under this coverage part, the employer would be defended in such a suit. If a judgment were rendered against the employer, that judgment would be paid by the workers comp coverage but no more than the limits provide for in the policy.

Standard limit of Workers Compensation coverage are written:

\$100,000 each accident/\$100,000 each disease/\$500,000 disease – policy limit

Increased limits of \$500,000, \$1,000,000, or greater can be written, and again, if the Association carries a well-written Umbrella policy, the Umbrella will extend (by whatever limit is selected) to the Workers Compensation limits.

“If Any” Workers Compensation

“If Any” workers compensation is an option for community associations that have no employees and don't anticipate hiring any employees, but that do hire contractors and service providers to perform work for the Association.

This coverage, however, is not intended to be low-cost Workers Compensation for associations that have employees or knowingly hire uninsured service providers. Associations should hire only licensed service contractors who show evidence of liability and workers compensation for their employees (and who name the association as an additional insured while they are performing work for you). This is safety net coverage to protect the association should a contractor come on site and not have this coverage (or not have maintained it despite showing a certificate) and be injured during the course of performing work for you. Under such circumstances, uninsured contractors can make a claim against you *and* your management company whether you carry Workers Compensation coverage or not.

VII. Business/Commercial Automobile Liability

This policy form is written for Associations that own and operate their own service vehicles. The typical coverage forms in Maryland include:

- Liability
- Personal Injury Protection (PIP)
- Added Personal Injury Protection (or equivalent Added No-Fault Coverage)
- Auto Medical Payments
- Uninsured Motorists
- Underinsured Motorists
- Physical Damage Comprehensive Coverage
- Physical Damage Specified Causes of Loss Coverage
- Physical Damage Collision Coverage

- Physical Damage Towing and Labor
- Hired and Non-Owned Automobile Liability

Your agent can help you write appropriate limits for each coverage.

VIII. Storage Tank Liability Coverage

An exposure that is often missed in community associations is fuel oil tank liability. Associations with backup generators may also have fuel tanks, either above-ground or on the roof, or underground. Depending on age, these tanks are subject to leakage and create environmental liability for an association when the fuel is absorbed into the ground or waterways. Premiums for these policies are extremely competitive (insuring the liability of a 1,000 gallon underground fuel tank runs approximately \$850) and coverage should be considered by the Board as an annual part of its insurance portfolio.

The Condominium Unit Owners'/HO-6 Policy

It may come as a surprise to most Boards, but for many years statistically less than half of all condominium unit owners in the United States carried HO-6 coverage. Many either did not know it existed or didn't understand the importance of it or believed the cost to be prohibitively expensive (the average HO-6 policy runs about \$350 annually). The numbers of those carrying HO-6 insurance increased following a December, 2008 Fannie Mae mandate requiring owners whose association's Master policies did not include betterments and improvements coverage to secure their own policies with dwelling coverage equal to 20 percent of the unit's appraised value. Fannie Mae dropped the requirement in December, 2011 (though many lenders continue to enforce the requirement). While the 20 percent mandate was (and remains) arbitrary, and for some owners excessive, those who secured loans before the Fannie Mae announcement in 2008 and after it was rescinded in 2011, may not carry HO-6 coverage and as such may not fully understand the limitations of the Master Policy's insuring obligation and where their own coverage would be essential.

While the association's insurance policies will pay to rebuild an owner's unit to original specifications following a loss, individual owners (and renters) should have their own unit owner or tenant policy to coordinate with the Master Policy and to protect their own property and liability. The amount of insurance on a resident's personal property should be adequate to replace the contents of the unit, and written on a full-replacement basis so that in the event of a loss, the item(s) will be replaced at current values rather than the original cost less depreciation.

Owners should take inventory of what they own, itemizing furniture and belongings room by room; determine the cost to replace your belongings and provide your personal insurance agent with the total value. In subsequent years an inflation guard should be built into the policy.

The owner's personal liability limits start at \$100,000, but may be increased. Liability protection covers injuries or property damage sustained inside the unit by people other than the unit owner. (The Master Policy's liability policy does not extend inside the individual units).

Important features of the standard unit owner policy are the provisions for (1) Additions and Alterations; (2) Loss Assessment; and (3) Additional Living Expense/Loss of Use. Additions and Alterations and Loss Assessment are included in the basic policy at a limit of \$1,000*. This limit can be increased for a small additional premium. The limit for Additional Living Expense is 50 percent of the limit for personal property. Thus, if personal property is insured for a limit of \$30,000, the Additional Living Expense/Loss of Use limit would be \$15,000. Owners should also insure for any improvements and betterments they have made or acquired from a previous owner. At time of loss, the Master Policy pays to put the unit back to the way it was originally conveyed by the developer.

Loss Assessment coverage is for instances when the condominium association suffers a large property loss or liability judgment and the association's policies do not entirely cover the loss. In such a situation, owners may be assessed a percentage of the repair bill or liability judgment.

Loss Assessment coverage would pay the individual owner's assessment up to the limit of the policy.

Loss assessment should not be confused, however, with a special assessment. From time to time, association boards are faced with unexpected expenses or expenses that are greater than originally planned. Owners may be individually assessed for a portion of this expense. The HO-6 policy, however, will not pay for an owner's share of a special assessment.

As discussed earlier in the chapter, Maryland law (as of June, 2009) automatically allows for the automatic shift of the Master Policy deductible, up to \$5,000, to a unit owner when a loss occurs from within a unit. Unit owners should make certain to advise their HO-6 carriers of this liability. While loss assessment coverage limits start at \$1,000, it is recommended that owners carry at least \$5,000.

Additional Living Expense/Loss of Use coverage reimburses a unit owner for expenses incurred if he/she is forced out of the unit following a loss. Hotel costs, meals, and other forms of additional expenses are covered by this policy feature. The Master Policy will not pay for a displaced owner/renter to live elsewhere during a unit's repair.

An HO-6 policy generally includes a \$250 deductible, but higher deductibles are available.

All owner or tenant policies have specific limitations on certain valuable items such as jewelry, furs, and silver. Such valuables should be scheduled on the policy at their appraised value. They would then be covered on an all-risk basis for replacement at the scheduled value.

Non-resident owners who lease their units should be aware of their special insurance needs, as well. These include not only personal liability coverage, but also coverage for any alterations or additions they may have made to the unit, as well as loss of rental income coverage. Investor owners may obtain these coverages either by an endorsement to their homeowner policy or through the purchase of a separate fire policy. Owners who rent their units need to also be aware of deductible responsibility when a loss originates in their unit.

Non-resident owners should also make certain (perhaps by making it a condition of the lease) that the renter carry a tenant or renters policy (includes coverage for the tenant's personal property and personal liability). The personal property coverage on the renters' policy also should be written on a full-replacement basis.

All owners should understand that if they are displaced for any period of time in the event of a loss (catastrophic or otherwise), they are still required to continue to pay their mortgage charges and in all likelihood, their condominium fees even if they cannot live in their units for an extended period of time. Master Policy and/or homeowners' insurance will not cover these obligations.

Requirements to Carry HO-6

Maryland law presently has no requirement of owners to carry HO-6 coverage. While most lenders require such coverage in order to close a loan, owners within any given community may still not carry it for any variety of reasons (they fear it is too expensive or their has been satisfied, thus so there is no lender enforcing the requirement). For associations that wish to require their owners to carry this important coverage (it also helps to fund the \$5,000 deductible if a loss originates in an owner's unit), a law was passed in Maryland in 2011 that makes it easier to obtain a bylaw amendment for this purpose. In most cases, amending a bylaw provision requires a 66 2/3 percent approval vote of an Association's members; the HO-6 law makes it easier, requiring only a 51 percent approval. The Condominium Act states

§11-114.2 Requirement of owner insurance policy on unit

- (a) *The bylaws of a condominium may require each unit owner to maintain a condominium unit owner insurance policy on the unit.*
- (b) *Bylaws that require each unit owner to maintain unit owner insurance also shall require each owner to provide evidence of the insurance coverage to the council of unit owners annually.*

§11-104. Bylaws

- (2) (ii) *The bylaws may be amended by the affirmative vote of unit owners having at least 51% of the votes in the council of unit owners for the purpose of requiring all unit owners to maintain condominium unit owner insurance policies on their units.*

Claims Administration

Because in many cases it is often difficult for a Board of Directors or a community manager to determine a claim's cause of loss, point of origination, or the extent of damage, it's advisable to report losses to your insurance agent so that the claim can be properly adjusted. A recommended procedure is:

- 1) To preserve the integrity of claims administration, have all unit owners report possible claims to the Board and/or management. That said, if the Board or management fails to report a claim on behalf of a unit owner(s), unit owners in Maryland have the right to report their own claims and agents have an obligation to file those claims.
- 2) Do whatever is necessary to keep the claim from getting worse, including contacting the restoration or service provider of your choice.
- 3) Remember that the Master Policy is primary; do not advise owners to contact their own carrier unless the unit has sustained damage to improvements and betterments, loss to personal property/contents, a loss to the unit has rendered the unit uninhabitable, or the owner has deductible responsibility.
- 4) The adjustment process will determine point of origination. Again, if the loss originates from within a unit or from components that service the unit, the deductible, up to \$5,000 is the responsibility of the unit owner. If the loss originates from a common element or limited common element, the deductible is an expense shared by the association.
- 5) Report claims as soon as practicable. Carriers may deny coverage on the basis of late reporting, if the loss was allowed to get worse due to late reporting, or if the loss was repaired and reported after the fact. Make sure to include the names, contact information, and unit addresses of all affected owners.
- 6) Take photographs of the damage whenever possible.
- 7) Briefly explain the claim scenario.
- 8) Keep all invoices for remediation and repair work.

Homeowners' Associations and Cooperative Apartment Associations

As expressed at the beginning of this Chapter, the insurance needs of Homeowners' Associations and Cooperative Apartment communities is not specifically addressed, but the coverages written for either can be similar depending on how the governing documents and the Maryland Cooperative Act and Maryland Homeowners' Association Act are written.

Cooperative Housing Corporations:

The Maryland Cooperative Housing Cooperative Act is largely silent on insurance, relying rather on lending requirements and the specific governing documents of the individual cooperative community:

(a) A contract for the initial sale of a cooperative interest to a member of the public for residential use is not enforceable against the initial purchaser unless: (1) The initial purchaser is given at or before the time a contract is entered into between the developer and the initial purchaser, a public offering statement containing all of the information

required by this section; and

(2) The contract contains, in conspicuous type, a notice of the initial purchaser's right to receive a public offering statement and the rescission rights provided under this title.

(b) The public offering statement shall contain at least the following:

§ 5-6B-02. Contract for initial sale of cooperative interest; public offering statements

iii) A statement as to whether the cooperative housing corporation has or will obtain insurance coverage for casualty, property damage, and public liability and if so, in what amounts.

Where Fidelity (Crime) coverage is concerned, the Cooperative Act provides for requirements identical to those found in the Maryland Condominium Act. See Section V. of this chapter.

It is recommended that Cooperative Boards of Directors and community managers work closely with their insurance professionals, then, to make sure that the community's insurance adheres to the provisions within the governing documents and the requirements of the lending community.

Homeowners' Associations

Homeowners' Associations (HOAs) typically are responsible for insuring only the common area property exposures and amenities and the common areas of the community. The homes within the Association may be fee-simple single family or townhomes where insurance is the responsibility of the individual homeowner, or condominium associations that are sub-associations of the larger HOA. There also may exist a Master Association that is an Umbrella association over many condominium and homeowner sub-associations.

The Maryland Homeowners' Association Act current includes no insurance guidelines or provisions, therefore, best practices, lending requirements, and the governing documents for the individual community will provide the criteria for the purchase of insurance. Boards and community managers should take care when working with insurance professionals to advise the representative of any and all exposures, including the existence of a clubhouse, pool, tennis courts, entry features, and anything that may be lost in a property loss or may be a source of liability.

The insurance recommendations in this chapter are a good framework for the types of coverages the typical community association might need, but it's important to understand that each community association is unique – property exposures, special liability needs, and coverage limits, may differ vastly from one community to the next.

We encourage you to seek the advice of a qualified insurance representation for your community, including an agent who will explain coverage versus cost. Too often communities select insurance based on an attractive premium, and then are surprised when a claim is not covered. Remember that as a member of a board of directors, or a

community management firm or attorney working on behalf of an association, it is your responsibility to protect the financial stability and longevity of the community. The right insurance products purchased through an insurance representative who understands community association insurance can help you to meet those responsibilities.

CHAPTER 12 CCOC AND THE MEDIATION PROCESS

The Commission's statutory mission includes advising the County government on ways to "reduce the number and divisiveness of disputes" between governing bodies and the residents of the communities. As part of this mission, the CCOC is to ascertain ways to "encourage informal resolution of disputes."

Chapter 10B of the County Code creates a dispute resolution process that includes formal hearings, much like trials in the Small Claims Court, and these hearings can result in legally-binding decisions which the County can enforce in court against the parties. This process takes time, and requires a considerable investment of the CCOC's resources.

Therefore, the CCOC strongly encourages mediation as the faster and simpler way to resolve complaints. The CCOC believes that when the parties are able to resolve their disputes between themselves, they often are able to restore good relationships and gain more respect for each other's positions. Mediation can also result in a party gaining at least part of what it wants, whereas a formal hearing, at which the CCOC must apply the law, can result in an "all-or-nothing" ruling. Finally, mediation can save the parties time and money.

The law requires the CCOC to dismiss a complaint if the complaining party rejects mediation, unless the staff decides that mediation would be futile. If the responding party rejects mediation, the law requires the CCOC to hold a hearing on the complaint at which the responding party is not allowed to present any defense. It also allows the CCOC hearing panels to penalize a party who unreasonably refuses to participate in mediation or who unreasonably withdraws from a pending mediation. For example, a CCOC hearing panel could reduce or deny a winning party's request for attorney's fees if it felt that the winning party had rejected mediation without a good reason and that the case might have been resolved in mediation. Mediation is an option to which the parties should give serious thought.

The CCOC's mediation program uses different kinds of mediation techniques. Currently (2017), it has an experienced volunteer mediators who are familiar with community association and who works closely with the parties to craft a settlement agreement.

If the mediation is successful, the CCOC case is closed. Chapter 10B of the County Code states that mediation agreements are contracts and can be enforced in court by the parties like any other contract. If the parties do not want the CCOC case closed, the CCOC recommends that the written agreement state that the CCOC case will be closed only upon completion of the agreement, and that if one party does not honor the agreement, the other party can ask to have the original dispute referred to the CCOC for a hearing. The CCOC will enforce some mediation agreements but only those which regulate the association's

operations or common areas.

If the parties cannot resolve their disputes in mediation, either party can ask that the case be referred to the CCOC for a vote on whether it will accept jurisdiction of the case and send it to a hearing panel for further proceedings, such as a formal hearing.

The CRC will also provide mediation services to associations or their members directly, without the need for the member or association to first file a complaint with the CCOC. This can be a useful resource for resolving disputes before they get to the CCOC, and for resolving disputes over which the CCOC has no jurisdiction, such as disputes between two neighbors

The CCOC staff can also conduct mediations and settlement negotiations.

CHAPTER 13

HOW TO COMPLAIN *EFFECTIVELY*

Whenever people live together, conflict and complaints are inevitable. Sometimes, conflicts cannot be resolved at all and the group or organization falls apart. Usually, however, conflicts *can* be resolved, and often in a way that improves the relationships between the members of the group as well and the performance and satisfaction of the group as a whole.

This is true for community associations as well, such as homeowner associations, condominium associations, and cooperative housing corporations. (For convenience, we will refer to all of these common ownership communities as “COCs.”) Currently, in Montgomery County, there are well over 1,000 COCs, with over 134,000 homes or units. This is 1/3rd of the County’s housing stock, and since most new construction is in COCs, the proportion is constantly growing. So is the importance of these communities and their members to the County as a whole.

While COC Boards of Directors and community managers usually try to act in the interests of all members, there are occasions when a conflict of interest or a simple ignorance of the rules of the HOA or of the law can lead to an erroneous or unreasonable action by the Board and a reasonable complaint from a member. Is it possible to challenge the Board and win? The answer is yes, but association members with legitimate grievances should understand the legal environment in which they are living and be sensitive to the best way to “prosecute” their cases. How to do so is the purpose of this Chapter.

THE CONTEXT IN WHICH WE LIVE

A COC is not a free-for-all. Nor is it a club or hobby group. COC’s are mini-governments. They are created by builders and developers, who write their basic documents. These documents are legally binding and will be enforced in court. The documents regulate how the association operates. They bind the association as a whole as well as the individual members. Both the association, and the individual members, have the legal right to enforce the documents. Simply put, a COC is a two-way street: the HCOC can enforce its rules against the members and the members can force the COC to obey its rules too.

There are many characteristics of an HOA, but these are the most important:

1. COCs are either corporations, or at least operated as corporations. **Most powers of the association and its members are delegated to an elected board of directors,** which has the right to make most of the operational decisions for the COC.

2. **There are checks and balances.** Members elect the boards, and retain certain rights, including the right to call a general meeting to adopt rules, repeal rules, amend the governing documents, and even to remove directors from the board.
3. **The COC must maintain itself in good condition and do so with its own funds.** All the money necessary to pay for the maintenance must be raised directly from the members. Therefore the COC has the right to charge fees, or assessments, sufficient to pay for the COC's operations.
4. **All COCs regulate what their members can do with their homes or units.** Members cannot alter the exterior appearances of their homes or lots without their COC's advance permission. In condominiums and cooperatives, the association can also regulate some conditions inside the units as well. (For example, they often have rules requiring carpeting or banning laundry appliances.) Members must also maintain their homes and lots in good condition and make necessary repairs.

The Board is essential to your COC. Board members are volunteers, and cannot be paid for their services. The work can be difficult and require many hours of service every week or month. But many Board members have had no experience or training in managing an organization as big as a COC. It therefore can happen that they misunderstand the limits of their authority, or don't know how to handle disputes and complaints properly. If you have a problem with your Board or your COC, this chapter will help to walk you through your options.

A FEW WORDS ABOUT THE MANAGER

Before we discuss how best to complain, let's clarify the role of your COC's manager. *Your manager does not run your association!* That's the Board's job. The Board hires and supervises the manager, and only the Board can tell the manager what to do. The manager does not make decisions for the COC. The Board must do that, and the Board cannot delegate that duty to the manager. The manager's duty is to help the Board make wise decisions and to carry out the tasks the COC needs to be done, such as paying the bills, collecting the assessments, maintaining records, inspecting the property and dealing with the contractors.

If you have a problem with how well the manager performs his or her duties, or with how the manager treats you or other members, you should first discuss it with the manager, and if that doesn't resolve the problem, you should notify the Board and ask for action.

HOW TO MAKE SURE YOU PROBABLY WON'T GET WHAT YOU WANT

Make it personal! Insult your manager or directors. Accuse them of evil motives and immoral conduct. Call them names. Tell yourself that the Board is attacking you or your good faith personally, and respond the same way. Once you put such things in writing, other people will see them too, and more people will think you're a jerk. This is a good way to encourage decision-makers to avoid you and alienate possible supporters, if that's what you want.

Wear them out! Send the directors and managers many long emails. Repeat the same things over and over so they won't want to read anything you write anymore, then accuse them of ignoring you.

Don't do any homework before you complain. Don't read the rules, or the proposed budgets, or the audits and studies. Assume that you have the right to do whatever you want and the Board is simply wrong. Ignore everything your association sends you so that you can complain that Board is keeping secrets from the membership and doesn't tell you where the money is going.

Insist that the Board or its manager answer every email and question you send them, and send them a lot of questions that are time-consuming to answer. After all, the directors are volunteers so it won't cost them any money to respond to you, and they have time on their hands, and the manager is being paid to do such things anyway. Right? If the board doesn't respond to every email and question, that gives you something else to add to your complaints.

Make threats about legal actions when you don't really know if you have a case or when you're not prepared to spend the time and money necessary to file one. This is a good way to shut down any conversation between you and your Board, because you'll force the Board to refer the matter to its attorney rather than talk to you directly.

Stick your head in the sand. Ignore your COC as long as possible. If the COC notifies you of a rule violation, or late payment fee, or other problem, assume that the problem will go away, or the COC will give up, sooner or later. Convince yourself that if you didn't intend to break a rule, then you didn't really break the rule, and so the association should leave you alone.

Make your only contacts with your community unpleasant ones. Rather than become involved in a helpful way—such as volunteering to serve on the Board or one of its committees—wait until you yourself have a problem and then blame the Board for causing it.

HOW TO COMPLAIN AND GET RESULTS

1. Do your homework.

The place to start is with your COC's governing documents, especially the covenants and the bylaws. Yes, it's boring, but you don't have to become an expert. What you really need to know is the major topics they cover. Start by reading the sections on the powers and duties of the Board of Directors, and then look for the sections which are most likely to be relevant to your dispute. For example, if you're worried about whether an election is going to be held properly, look up the section on Elections.

Then, inspect your COC's paperwork. Don't expect the Board to do your research for you. You have the legal right to inspect almost all of the records of your association. Ask to see the kinds of records that are relevant. For example, if you think the Board is wasting money, or raising the assessments without good reason, you will want to see the proposed budgets for the year and maybe the years past, and the most recent audits. You can see the financial records, contracts, invoices and checks that back up the budgets and reports. If you think you're being

discriminated against because the Board sent you a violation notice when other members with the same condition were not sent violation notices, ask to see the files for your home and for all the other homes with similar conditions.

Do some outside research on the topic, too. You can find a lot of information on COC management online. The relevant Maryland laws can be found online easily. There is much free information on the CCOC website, including the mandatory training class for association directors. You can email or call the CCOC staff for advice on relevant laws and best practices and for advice on how to best pursue a complaint. Finally, think about consulting a lawyer for an objective legal evaluation of your situation.

2. Document Your Problem

If the COC is taking action against you, it is typically in order to require you to take some action or to collect past dues and fines. If you are taking action against your COC it is usually to require the COC to perform the responsibilities it is obliged to perform under the rules -- for example, to approve your reasonable request for improvements to your home or to hold its annual meeting.

If the COC is claiming you violated a rule, it should inform you of the specific rule involved. If it doesn't do so, ask for a copy of the rule. You may have to find it in the governing documents. Sometimes, the rules do not say what the COC's Board members think they say. Look for general or ambiguous language. (Or, for that matter, look to see what the rule does NOT say.) In some cases, different sections in the COC documents internally conflict, i.e. say opposite things regarding the same issue.

Then, document your actions. In general, keep copies of emails, letters, bills, and warnings from the COC and date everything. If you have a conversation with anyone acting as a representative of the COC, be sure to write down your understanding of the conversation in the form of a confirmation letter, and mail a copy of that letter to the COC. This gives the COC an opportunity to correct anything you might have misheard. If the COC does not correct your understanding, as set forth in your letter, the statements in your letter could serve as strong evidence of what was actually said.

- If the COC has routinely violated or ignored the rules in the past, while presently seeking to enforce a rule against you arbitrarily, you will have evidence to document that it is not treating you fairly and reasonably.
- As a member, if you were granted an exception to the COC rules, be sure to get that exception in writing, specifying precisely what was granted, who granted it, when, and for what time period. Some such exceptions might need to be recorded with your county recorder's office in the same way as your property deed.
- To avoid keeping heaps of paper, scan these documents and keep electronic copies, ensuring that you have adequate file backups in case of a computer malfunction, burglary, or catastrophic loss.

Make sure your COC has updated and amended their rules to incorporate County and State governing statutes. If not, some of your COC's rules may be found to be unenforceable by the court or other agency. For instance, laws governing flags and solar panels placed upon structures and the Federal Communications Commission rules regarding the placement of antennas and satellite dishes may supersede provisions of older COC documents.

Anonymous complaints are seldom useful. If the violation cannot readily be confirmed, the Board will need witnesses at any hearing who can verify the violation and give details.

If you are claiming the COC violated a rule, it will help if you document your claim and try to state it as factually as possible. Refer to the specific rule or law you think is involved, show how the Board did something (or didn't do something) that violated the rule or law, and say what you think the Board should do now to correct the violation. Attach photos if relevant, or copies of the sections of the rules or laws, and documents that are relevant. For example, if the Board was required to make documents available to you and refused, attach a copy of the law, of your written request to see the documents, and of any reply you received.

3. Follow the Procedures Established by Your Association

Your COC probably has rules on how it should enforce its governing documents against its members. Learn what the rules are so you can make sure the COC obeys them and so that you can use them to protect your rights. If you get a violation notice, don't ignore it. Answer it and explain what your defense is, and ask for a hearing with the Board on it if necessary. The COC should not penalize you for a violation without first offering you a hearing to defend yourself.

However, most COCs don't have rules that state how members can complain about their *COC's* violations of the rules, or about *other members'* violations of the rules. If your COC does have such rules, follow them when you make your complaint. If the COC does not have any specific regulations, you should at least give the Board a clear and objective written notice of the problem and ask it to respond by a certain date (see above). You might also have the right to raise the issue at a Board meeting during "member time."

If you disagree with a fee or new assessment, it's vital that you pay them on time anyway and challenge them later. If you ignore the COC's bills, not only will they begin to add up, but they likely will begin to accumulate additional late fees, penalties, and/or interest. The COC usually has the power (and likely the will and ability) to place a lien on your property and even to foreclose on the property in order to collect the fines.

- If you are successful in your fight against the COC, you likely will be able to get your payments refunded with interest.
- Remember, however, to make an effort to negotiate a resolution of fines and/or collection disputes between you and your COC or its lawyer. Your COC may be incentivized to settle your matter in order to avoid future expensive attorney fees.

4. Present your case in a way likely to make the board want to help you.

Complaints may eventually result in disagreements and anger, but they don't have to start that way and most of them don't have to sink into hostility.

Be positive. The best way to start preparing a complaint or request is to assume that the Board and its manager sincerely want to make the members happy and to make the COC a pleasant place to live in. Try to put yourself in the shoes of (or the minds of) the people you're going to speak and write to, and to think about the kind of approach most likely to make them want to help you.

This approach is something that you can begin early. One of the wisest comments we received in preparing this chapter was this:

Members must set the stage to have their needs addressed long before they need something. Congratulate board members on important milestones—elections, promotions, writing a good budget proposal. Send cards and emails of support. Send holiday cards and express satisfaction with whatever job they are doing. Then, if you are lucky and respectful, they might just not take offense at your complaint and will want to help you when the time comes. Start every request with a sincere compliment—state how you understand the difficulty of their job and that the last thing you want to do is to add to their workload—and then proceed.

Or, in other words, the Board is more likely to pay attention to a member who has generally been respectful and appreciative of others, and who has shown a helpful interest in the affairs of the COC. Such an attitude is also good preparation for serving on the board someday.

Consider also that Board members and managers are human beings, subject to all of the limitations that the rest of us are. Most of them have no formal training in how to handle conflict. Many of them will have invested a lot of time managing your COC and might take criticism of their efforts personally. Take this into account and avoid making the situation worse.

When you make a complaint:

1. Stick to the facts and don't make personal attacks. Describe your problem in a way that will help the association see the issue from your point of view. Include supporting documents or photos when you can.
2. Say what resolution you want, or offer solutions.
3. Thank the person in advance for helping.
4. Suggest a meeting in person to discuss the problem informally.
5. Ask for a time by which you want the HOA to reply.

Deal only with the person designated by the Board to handle your complaint as long as possible. Swamping the entire Board with your emails and other correspondence could make the Board want to avoid you entirely. Give the Board's representative a chance to work with you.

Don't assume that the response of one manager or Board member represents the position of the entire Board. The full Board is less likely to react emotionally than one person might, and more likely to be objective if you treat the Board and its representative decently.

If the Board does not respond to your concerns, *request a hearing*. Write a professional letter respectfully asking for a hearing on your issue. Attend the hearing with multiple copies of your evidence and/or a signed petition showing neighborhood support. When you speak, keep it factual. While you may feel anger and frustration, keep your statement clear, concise, and professional. In your written request for a hearing, request copies of the COC's records that were used as a basis for its action against you, or the denial of your request for improvements to your property. (However, some executive sessions of the Board meetings may be able to be held back from you, so check the laws that govern your type of association.)

You can also consider filing a grievance with the Board against specific individuals in the COC (or under the COC's control) who are harassing you or violating the COC's rules (for example by causing loud noises at night). Again, even though such grievances might become personal, avoid making them worse, and do not trade insults. If you have to make a complaint against another member or resident, keep it factual and avoid abusive comments.

Finally, be willing to compromise. Listen to what the Board says. Sometimes, the COC's rules or the law gives the Board little choice in how to act. Sometimes, especially when there is a claim against you about an architectural or maintenance matter or too much noise, the Board might be in the middle, because it's trying to respond to a complaint made against you by another member, whom it should not ignore. Try to understand the Board's situation. The end of a complaint does not have to be an all-or-nothing conclusion.

On the subject of compromise, consider solutions that might not have been raised so far, but which might satisfy the Board's concerns while still giving you what you really need. For example, if you install a shed without permission, the Board might be willing to grant an exception or "variance" that allows you to keep the shed until you move or it has to be replaced, at which time you will remove it. If you have a commercial vehicle which is not permitted in your association, the board might allow you to park it as long as you keep it covered when not in use.

6. Look for support.

Connect with your neighbors. If you are having an issue with your COC, your neighbors might be having the same issue. They can help to advise, support, and strengthen your case. The more members that join together, the more likely the Board will reconsider its position. It could be

useful to gather signatures of neighbors who agree with you into a petition that you can present to the Board. As a unified group, you can more easily make positive changes by convincing board members to vote for specific changes to the rules or by voting in (or out) specific board members.

Remember, that the members have the right to amend the governing documents and to pass or repeal rules and regulations.

A word of advice on changing or adopting rules: remember, the Board must consider the wishes of the entire community. What seems like a fair and reasonable new rule to you might not seem so to many of your neighbors, and their opinions must be taken into consideration as well.

7. Appeal Your Case to a Higher Authority

Think outside the box. Remember that internal hearings or meetings are not the only ways to challenge the Board. For instance, if you can attract the attention of local media, you might cause your COC to reconsider its actions or else at least to explain them more fully.

Another option is to take your case to the Montgomery County Commission on Common Ownership Communities (CCOC). The CCOC was established pursuant to Montgomery County Code Chapter 10-B with a three-fold mission: to advise the County Executive and County Council on problems and solutions arising in common ownership communities, to promote public awareness of the rights and obligations of living in common ownership communities, and to serve as a means of alternative dispute resolution involving conflicts between association members and boards within the scope of its charter. The CCOC has jurisdiction to handle disputes between two or more parties involving the authority of a governing body, under any law or association document to

- Require any person to take any action, or not to take any action involving a unit;
- Require any person to pay a fee, fine or assessment;
- Spend association funds: or
- Alter or add to a common area or element.
-

The CCOC charter also includes jurisdiction on matters involving the failure of a governing body, when required by law or an association document, to:

- Properly conduct an election;
- Give adequate notice of a meeting or other action:
- Properly conduct a meeting;
- Properly adopt a budget or rule;
- Maintain or audit books and records: or
- Allow inspection of books and records.

Filing a complaint with the CCOC is relatively straightforward and involves completing a standard form and submitting a filing fee of \$50. As part of the initial process, the CCOC staff will offer mediation to help reach a settlement agreement. If mediation fails and the complaint be accepted by the CCOC, your case will be assigned to a Hearing Panel consisting of an impartial licensed attorney and two members of the Commission. You need not be represented by a lawyer, although you may retain one if you wish. Decisions by the CCOC have the force of law, but may be appealed to the Circuit Court. There is a wealth of material regarding good governance and best practices for managing common ownership communities, including detailed instructions on filing a complaint against your COC, on the CCOC's website.

Consider discussing your concerns with a lawyer. Doing so does not necessarily mean that filing a lawsuit will be necessary—the lawyer's advice might be sufficient to help you through your complaint. The mere presence of a lawyer in the case often can persuade the COC to reconsider its position. You can also hire a lawyer for the limited purposes of sending letters and demands on your behalf. Hire someone with experience in handling COC disputes. This might not necessarily be a real estate lawyer. COCs are not-for-profit organizations similar to corporations, which is a different thing entirely from typical real estate issues. The Montgomery County Bar Association can refer you to lawyers that practice in the area of law that applies to your type of case.

You can also file a small claims action by yourself. The Maryland Small Claims Courts (a division of the District Courts) can hear cases seeking less than \$5000 in damages and which do not request injunctions (orders to do something). Claims seeking injunctions or damages greater than \$5000 must be heard by other, more formal, State courts.

- You can bring a cause of action against the Board claiming that it acted wrongfully and, as a result, you have suffered a financial loss.
- If you are successful in small claims court against the COC, the court can order it to reimburse you for the amount of fine you were wrongfully required to pay as well as your court costs.
- Personally visit your local District Court, or visit the State court's website, to obtain instructions and forms on how to proceed with your action.

Watch for discrimination. If the COC is citing and fining you, but not other members for the same infractions, it possibly is acting in an arbitrary and capricious manner, which opens the door for lawsuits based on discrimination. For instance, if you are denied permission to build a pool, but other neighbors of a different race or nationality have been allowed to do so, it is worth the effort to catalogue which neighbors, the location of their pools, and the approximate dates your neighbors installed their pools. If you can show that your denial was based on a "protected characteristic" such as your race, gender, national origin, religious belief, marital status, etc. you are well on your way to winning your fight against the COC.

Courts may find against COCs when their actions fail to be fair and uniformly applied to all homeowners' and you do not necessarily need to prove that they discriminated against you based upon a protected class. If you can show that your COC treated you differently than it did other

homeowners' in your similar circumstance, its case against you will be weakened dramatically in the court's eyes.

8. Some Closing Thoughts

If someone give you information, advice, or assistance, THANK THEM, even if it wasn't what you wanted to hear.

Your COC must give you proper notice that you are in violation of a rule as well as an opportunity to contest any fine. If no such notice was given, you might be able avoid the citation and/or fine.

Some claims must be made quickly or your right to make those claims could expire. Thus, if you have been wronged, it makes sense to fight sooner than later—before you are legally barred from fighting by a statute of limitations.

BE PERSISTENT. This is especially true if you are trying to change a longstanding COC policy or rule. People are used to what they know and reluctant to change, and this applies to the general membership as well as to the Board. You may have to think in terms of months, or even years, to achieve the changes you think are necessary. Be prepared to reach out to, and persuade, your neighbors, not just once but often, in spite of the early setbacks you might experience.

We have covered a lot of different topics and ideas in this article, but many of them are just illustrations of the Golden Rule: treat other people the way you'd like them to treat you. It's a good rule for all members, those who are on the Board as well as those who aren't. Keep it in mind.

Bruce Fonoroff, Commissioner

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Sources

1. *Much of this material was taken from “How to Fight Your HOA (Homeowners’ Association), article provided by wikiHow and used with permission, <http://www.wikihow.com>.*
2. *CAI Rights and Responsibilities of Community Leaders,*
<https://www.caionline.org/HomeownerLeaders/Pages/RightsandResponsibilities.aspx>
3. *CAI Code of Ethics for Community Association Board Members,*
<https://www.caionline.org/HomeownerLeaders/Pages/default.aspx>

The Business Judgment Rules

In disputes between associations and their members, the legal issue most often involved is the “business judgment” rule.

Arguably, there are at least 3 related but distinct legal principles that can be called the “business judgment rule”, and they will be described separately in this Chapter. Defined in very general terms, the business judgment rule says that *the decisions of the governing body of an association and its members—usually the board of directors—are assumed to be correct, and the courts will therefore uphold them unless certain conditions are met.*

Or, put another way, when a dispute over the validity of a decision of the board is brought before a court, the court will not substitute its own judgment of what is best for the association in place of the judgment of the board of directors, so long as the board acted properly.

The business judgment rule is derived from the law of corporations, and it is applied to common ownership communities because most of them are also corporations, and even when they do not have corporate charters they are governed much like corporations. In all common ownership communities, as in corporations, the members share the ownership of the association’s property, and they delegate their rights to manage the association’s affairs and to control its assets to an elected board of directors.

The Commission currently registers well over eleven hundred common ownership communities. There are probably tens, if not hundreds, of thousands of corporations of all kinds doing business in Montgomery County alone, from multinational defense corporations to auto repair shops and nonprofit charities. It would be impossible for the courts to supervise every decision of these corporations, nor would we probably want to substitute the opinions of judges for those of the stockholders and managers in the day-to-day operations of these organizations. For practical reasons, and because the courts lack the expertise to run such varied and often complex entities, the courts have developed a set of rules that limits their ability to review the decisions of private enterprises to those in which the organization acted improperly, arbitrarily, or in bad faith. This means that if the only issue is the wisdom of a decision—whether to adopt a rule or raise an employee’s pay or to increase the assessments—then the court will uphold the decision.

As noted at the beginning of this Chapter, there is no single business judgment rule. There are at least 3 distinct business judgment rules recognized by Maryland law. The facts of the dispute will determine which rule applies, and it is possible that a single case can involve all three of the rules.

1. The Protection of Individual Members of the Governing Body (“the Right to be Wrong”)

State law (Real Property Article, Section 14-118, Courts & Judicial Proceedings Section 5-422), says that individual members of a board of directors cannot be held personally liable for their decisions, and in fact cannot even be named as defendants in a lawsuit against an association, unless there is evidence to show they engaged in serious misconduct.

In *Reiner v. Avenel Community Association* {following this section}, a trial court not only dismissed a complaint made against the individual members of a board of directors but

went on the order the homeowner to pay the association's legal fees to defend them, as a penalty for violating Section 14-118.

Note that under these laws, the only reasons for which board members can be sued are acting outside the scope of their duties, or in bad faith, or in a "reckless, wanton, or grossly negligent manner." ("Gross negligence" is generally defined as the deliberate or reckless failure to exercise ordinary care.) Mistakes, negligence, and bad judgment are *not* reasons for which a board member can be held personally liable.

In other words, board members are protected from individual liability if they make a decision that is later found to be a bad one, or even if it is later held to be in violation of some association rule or even in violation of some law. Thus, for example, a board might adopt an assessment increase that under its rules should have been adopted by a vote of the general membership, or perhaps the board decided in a closed meeting that should have been made in an open meeting and which thus was made in violation of State law.

Nonetheless, if they were acting in good faith, the individual members of the board cannot be sued merely because they made a mistake in interpreting or applying a rule or a law. For the exception to apply, it must be shown that the board members acted recklessly or with gross negligence, or that they intentionally violated their governing documents or a relevant law. Similarly, the board might place some of its funds in an investment account that later loses value. So long as the board acted in good faith and with due care, its members cannot be sued for the association's financial losses.

Because of this protection, this aspect of the business judgment rule can be called "the right to be wrong." There are good reasons for such protection. Common ownership communities depend heavily on the efforts of volunteer boards of directors, and usually the volunteers have had no previous experience in managing complex organizations and large sums of money. If board members knew they could be sued personally for every mistake they might make, it would probably be impossible for our communities to fill their boards and manage their own affairs. In this way, the business judgment rule provides a great benefit for our associations.

This legal principle is built into the County Code as well. Section 10B-8 defines a "dispute" as a disagreement over "the authority of the governing body" to do, or to fail to do, something. The Commission interprets this to mean that all disputes must involve the decisions of the board or of the council of unit owners. The decisions and conduct of the individual members of the board or of the individual members of the council of unit owners do not represent the decisions of the board or council of unit owners as a group. Consequently, the Commission has never accepted jurisdiction over complaints against individual members of the governing body of an association, but only against the governing body itself.

2. The Protection of the Board's Business Judgments

The legal protections granted to the individual *members* of the board of directors and of the governing body do not necessarily protect the *decisions* of the board or the governing

body. A board's decisions can be overturned even if the board's members can't be sued for making those decisions. When members challenge the decisions of a governing body, they can be successful not only if they can prove bad faith or fraud, but also if they can prove that the governing body did not have the legal authority to do what it did.

For example, in *Ridgely Condominium Association v. Smyrnioudis*, the Court held that the decision of the governing body was invalid because it conflicted with the association's own Declaration of Covenants. The Commission applied a similar reasoning in *Stalbaum v. Ashley Place at Tanglewood*, #26-14, when it invalidated a rule allowing the board to revoke the parking privileges of a member who was delinquent in his assessment payments when the HOA's own covenants only stated that it had the right to deny access to recreational facilities. In *Voorhees v. Decoverly I HOA*, #05-11, the panel held that the association must refund \$1000 to its members that it used to clean up a tract of land that it did not own, because the governing documents stated that the community's funds could only be used to maintain the community's property. And a condominium's decision to spend money on a study to add a new common element was declared invalid when the board failed to obtain a majority vote of the membership for such a project when required by the association's bylaws in *Glenn v. Park Bradford Condominium*, #29-11.

Conversely, in the recent decision on a Montgomery County dispute, *Reiner v. Avenel Community Association, Inc.* [following this section], the court upheld a board's decision to enforce a rule banning the use of asphalt roof materials when the homeowner could not produce any evidence that the rule violated the County Fire Code or that the rule was not properly adopted.

Consequently, a governing body's decision can be overturned, even if made in good faith and without fraud, if the decision was not made in compliance with an association's own governing documents or in compliance with a relevant law. They can also be reversed if they are "arbitrary or capricious," meaning that they cannot be rationally justified.

The law and the Commission require the member intending to challenge a decision that is protected by the business judgment rule to allege, and provide evidence of, bad faith, fraud, arbitrariness or of a lack of legal authority. It is not enough simply to claim fraud, bad faith, arbitrariness or lack of authority. There must be a showing of some supporting facts or of a specific law or rule that has been violated. Without such a showing, the Commission will often simply refuse even to accept a complaint for a hearing. See, for example, the Commission's extended discussion of the business judgment rule in #66-09, *Simons v. Fair Hill Farm HOA*, in which it held that a member filing a complaint challenging the board's business judgment had the burden of proof of alleging, and documenting, bad faith, fraud, or lack of authority, or else the complaint could be dismissed for lack of jurisdiction.

The business judgment rule protects the governing body's decisions, whether those decisions are decisions to do something or decisions not to do something, but the rule does not protect the board's FAILURE to make any decision at all. This is implicit in the title of the rule: it protects judgments, otherwise defined as "the exercise of discretion," consequently, it does not apply to inaction.

This point was emphasized by the leading commentator on the law when he wrote:

Consider the breadth of the enumerated powers that this example of [the typical bylaws] presents. First, the members of the board have an obligation to act. This means that the board must decide when confronted with a germane issue; the board may not refuse to consider the issue and thus refuse to meet its duty. Not acting is just as much an affirmative decision as acting. . . .

A board should have enough information to make an “informed” decision and must decide. The board must deliberate and decide, not procrastinate or equivocate, allowing inaction to produce a consequence called a “decision.”

W. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW at 83, 99 (3d edition 2007). The Court of Appeals applied this exception in the recent case of *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium Association*.

In that case, the board of directors was aware for several years that the new condominium had extensive water leaks. Although aware, the board failed to take any action for several years. When it finally voted to sue the condominium’s builder for breach of warranty, its case was thrown out by the trial court because the Statute of Limitations had run out before the case was filed. The members of the association then sued the association for damages and the Court of Appeals ruled that they could do so and that the business judgment rule did not protect the association. Although this case is well-known because of the Court’s holding that members can sue associations for negligence, it is worth noting that the negligence here was not that the board decided not to sue, but rather that the board did not make any decisions at all until it was too late. The board negligently lost its rights to sue the developer and thus negligently lost the members’ legal rights. If the board, knowing of the water leaks, had made a timely decision not to sue, it might well have avoided liability under the business judgment rule. (Note also that this lawsuit was against the association, not against the individual members of the board of directors.)

(The Commission has also upheld a claim against an association by one of its members for negligence in *Prentice v. Sierra Landing Condominium Association*, #15-08. In that case, the Commission ruled that an association that failed to make timely and effective repairs to prevent an ongoing water leak into a unit was liable to repair all the damages to the unit, even those that were not otherwise covered by the condominium’s master insurance.) The business judgment rule is incorporated into, and defined by, Section 10B-8 of the County Code.

The specific definitions are important:

- (4) *Dispute* means any disagreement between 2 or more parties that involves:
 - (B) the failure of the governing body, when required by law or an association document, to:
 - (viii) exercise its judgment in good faith concerning the enforcement of the association documents against any person that is subject to those documents.
- (5) *Dispute* does not include any disagreement that only involves:
 - (E) the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action. (Emphasis added.)

What Section 10B-8 requires the governing body to do is to "exercise its judgment". It recognizes the right of the governing body to decide to do something, or to refuse to do something. But the board must decide when required to do so, and its decision must be within the scope of its legal authority and made in good faith.

The business judgment rule also extends to the board's interpretations of its governing documents. When a rule or section is vague, or can be interpreted in more than one way, the courts must uphold and apply the board's interpretation if it is a reasonable one, even if other reasonable interpretations are also possible. *See, Tackney v. U.S. Naval Academy Graduates Alumni Association*, but see also *South Kaywood Community Association v. Long*,

This latitude especially applies to the board's exercise of its authority to preserve the overall architectural scheme of the community. When the governing documents are vague concerning a specific architectural item or change, the board's determination of what is consistent with the overall design of the community is given great weight, and it will not be reversed by a court simply because the relevant rule is vague. The board has the right to interpret vague rules. See the case of *Markey v. Wolf*.

The Commission gave an excellent example of how the business judgment rule should be applied in *Prue v. Manor Spring HOA*, #39-09, where, among other matters, the Commission upheld the board's interpretation of the clause "the rear wall of the house" when it was not clear how that clause applied to the house design in question.

3. The Protection of the Board's Decisions to Enforce Its Rules

When the board of directors wishes to take an action that restricts a member's or resident's rights to use his property as he sees fit, or to penalize a member or resident, the business judgment rule requires it to meet a higher standard than that required by good faith. In addition to acting within its authority and in good faith, the board must have a reasonable basis for its decision, and that reason must be related to the overall purposes of the association.

The case usually referred to for this principle is *Kirkley v. Seipelt*.

In *Kirkley*, an HOA member had installed, without permission, a metal awning of the front of his house and the HOA board told him to remove it. He challenged that decision in court, arguing that the governing documents did not mention awnings at all, that two other lots had awnings on the fronts of their houses, and that other homes had awnings on the rears of the houses. The Court of Appeals rejected all his arguments. The Court held that the HOA had not waived enforcement of its rules simply because 2 other homes, out of hundreds, had awnings on them; and there was a big difference between installing awnings on the rear of a home and on the front of the home where they were more obvious.

Most importantly, the Court held that the board had the right to interpret and decide how to apply its governing documents, so long as it did so in a way that was consistent with its overall purposes. In this case, although the documents did not specifically prohibit or regulate awnings, the community had been constructed without awnings, and the board's decision not to permit awnings was consistent with the overall architectural design of the

community. The Court set the standard that is still followed today in rule enforcement cases:

We hold that any refusal to approve the external design or location by [the association] would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and that this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or capricious in manner.

In the important case of *Simons v. Fair Hill Farm HOA*, #66-09, the Commission discussed the meaning of *Kirkley v. Seipelt* in the overall context of rule enforcement.

The *Simons* panel held that in rule enforcement cases, as well as in cases where the association imposes penalties on its members, the burden is not on the member to prove that the board acted in bad faith to prevail. Rather, the burden is on the association to show that it had a good reason for its decision. In *Simons*, the board could not show any evidence on which it based its decision that the member had damaged the association's trees and therefore the panel overturned the board's decision.

It should also be noted that not only must the association show that it has a reasonable basis for its decision, but that the reason must be related to one of the overall purposes of the community as specified in its governing documents. Most such documents allow the association to regulate parking, architectural changes, and how the lots may be used.

In *Reiner v. Avenel Community Association, Inc.*, the Court seems to say that a board's decision to limit a member's right to install the roof shingles of his choice is a "business judgment" that can only be reversed if the member shows fraud or bad faith by the board, and that the "reasonableness" standard is not applicable. However, that must be taken in the context of the court's statement that even if the "reasonableness" standard did apply, the homeowner failed to produce any evidence that the decision conflicted with any law, or that the board did not have the legal authority to make the decision, or that the board's decision was unreasonable. On the contrary, the court stated that the rule and the board's decision reflected a reasonable effort to comply with the standards in the HOA's governing documents and to preserve the appearance of the community as it was.

The Commission generally takes the position that "disputes" involving the board's rule enforcement decisions are not covered by the business judgment rule of Section 2 of this Appendix. The reason is that Section 10B-8(5)(E) states that the word "dispute" does not include any disagreement that "only" involves the exercise of the governing body's judgment or discretion in taking or deciding not to take any legally-authorized action." In the Commission's view, a dispute over a rule enforcement action involves not only good faith and whether the board had the authority to enforce a rule, but it also involves, as per *Kirkley v. Seipelt*, the factual issue of whether the board had a good reason for its decision; and the Commission expects the governing body to prove, with competent evidence, that it had a proper reason.

If the association can show that its decision to enforce a rule is within its authority and that it has a reasonable basis that is related to the purposes of its governing documents, then the Commission will usually respect and uphold the association's decision, and not substitute its own judgment for what constitutes the proper appearance of the community or how its lots can be used.

The Commission treats rule enforcement disputes much differently when the party to the case is the member or resident against whom the association is enforcing a rule, then when the party is trying to force the association to enforce a rule against someone else. In the former case, the party is directly affected by the association's action. In the latter case, not only is the party not directly affected but also wants the association to directly affect someone who is not a party.

The Commission does apply the business judgment rule of Section 2, above, to such cases because Section 10B-8(4)(B)(viii) only grants the Commission authority over "disputes" to the extent that they involve "the failure of the governing body, when required by law or an association document, to exercise its judgment in good faith concerning the enforcement of the association's documents against any person that is subject to those documents." Thus, so long as the board decides about whether another person has violated a rule or not, and has done so in good faith, the Commission has no jurisdiction over complaints that seek to make the board act against another person.

Therefore, it is the burden of the complainant to show either that the board failed to decide ("exercise its judgment") or that the board did decide but that it was motivated by bad faith. If the board decided not to enforce a rule against another person, and complainant does not allege and document the existence of bad faith in connection with that decision, the Commission will usually refuse to accept jurisdiction of the complaint.

There are several reasons for this policy, but the simplest one to understand is this: the governing documents almost always require the board to enforce the governing documents, but they almost never say *how or to what extent* the board must do so in particular cases. They do not say, for example, that the board *must* issue fines or assess penalties or file suit, although they might *allow* the board to do so.

Nor do they say that the board must find a member to be in violation simply because another member complains about him or her. In effect, they give the board the discretion to decide how to deal with such issues. See the cases of *Markey v. Wolf* and *Black v. Fox Hills North Community Association*.

4. The Meaning of “**Fraud or Bad Faith**”

The protection given by the law to individual board members and to the board’s decisions does not apply when the members decide fraudulently or in bad faith.

As suggested above, the courts assume that the governing body acts in good faith. The party wishing to dispute the decision must therefore prove, with evidence, that it acted in bad faith. Most members equate “bad faith” with “conflict of interest,” and assume that any conflict of interest renders the board’s decision invalid and the members responsible personally liable. The law is more complicated than that.

Section 2-419 of the Corporations and Associations Article specifically permits a board member to vote on a matter in which he has a possible conflict. To do so properly, he must first disclose the existence of the conflict to rest of the board, so that it has full knowledge of all the facts. Secondly, the board member can vote on the issue so long as he does not cast the deciding ballot.

In this context, we should distinguish between actual and potential conflicts of interest. The real issue should be whether the association benefits from the decision and how much it benefits. For example, a board member may run a landscaping company. If the contract he offers for his services to his own association is for a lower price than his competitors can offer, then is there a real *conflict* of interest? If both parties benefit from a transaction, are their interests the same? Whenever there is the possibility of a conflict of interest, the parties should try to look behind the label to determine whether the decision makers knew about the possible conflict, and the extent to which the decision was intended to assist the association.

In an important case involving claims of conflict of interest and bad faith—although not a case involving a community association—the Court of Special Appeals wrote that the test was this:

If the [trial] court finds that the transaction was, on the whole, motivated by a legitimate corporate purpose, it should declare the sale to be valid; if it finds to the contrary—that the purpose of the transaction was primarily one of management’s self-perpetuation and that that purpose outweighed any other legitimate business purpose—it should declare the sale to be invalid.

Thus, even a real conflict of interest will not necessarily invalidate a decision if the primary purpose of the decision is to benefit the corporation.

Conflicts of interest are not the only example of bad faith, however. Maryland’s courts have defined “bad faith” to include much more than conflicts of interest. In recent decisions, they have stated it in various ways:

The business judgment rule insulates business decisions from judicial review absent a showing that the officers acted fraudulently or in bad faith. (*NAACP v. Golding*.)

Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty, or incompetence? [T]he courts cannot be invoked to review [the decisions of a board of directors] coming properly before them, except in cases of fraud— which would include action unsupported by facts or otherwise arbitrary.” (*Black v. Fox Hills North Community Association*.) Thus, “fraud or bad faith” can include not only conflicts of interest but also “dishonesty,” “incompetence,” “arbitrariness,” and decisions “not supported by facts”.

Leading Maryland Court Decisions

Kirkley v. Seipelt, 128 A.2d 430, 212 Md. 127 (Md. 1957):

1. Homeowner association covenants running with the land that regulate the appearance of the community are valid and enforceable;
2. a general clause in the Declaration of Covenants that prohibits all changes to the lots without the permission of the association is valid and enforceable even if it does not mention in any detail the specific changes to which it can be applied;
3. the decision of a board of directors to reject an application to change the appearance of a home must be upheld by the courts if "based upon a reason that bears some relation to the other buildings or the general plan of development and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner."
4. The existence of 2 other homes that have metal awnings on the fronts of the houses in a development of 1500 homes do not constitute abandonment or waiver of the covenant to prevent the board from rejecting an application to install metal awnings on a 3rd home in the community.
5. The fact that the covenants did not specifically refer to metal awnings did not prevent the board from denying an application for awnings, so long as the board's decision was reasonably related to its authority to regulate the overall appearance of the community.

Savonis v. Burke, 216 A.2d 521 (Md. 1966).

1. In a dispute between two landowners over the boundaries of a strip of community land, a person who examines the plat which shows the existence of the correct boundaries cannot reasonably rely on another person's oral statement of where the boundaries are;
2. a party claiming the benefit of equitable estoppel must prove that another person's statements misled him, and that they caused him to change his position for the worse in reasonable reliance on those statements.

Lindner v. Woytowitz, 37 Md.App.652, 378 A.2d 212 (Md. App. 1977):

1. An above-ground swimming pool is a "structure" within the meaning of the association's covenants;
2. An association has not waived its right to enforce its rules that require permission for all changes to the lots against a member who wishes to install an above-ground swimming pool simply because other members already built above-ground swimming pools on their lots, when 2 of the 3 had done so without the association's knowledge and the 3rd pool had been permitted as an accommodation for a member with a disabled child. "An intention to abandon [a rule] is essential. The question whether there has been such an abandonment is in each case a question of fact and must be established by evidence clear and unequivocal of acts of a decisive nature."

Dulaney Towers Maintenance Corp. v. O'Brey, 46 Md.App. 464 (Md. App. 1980):

1. "House rules" of a condominium—those regulating the use and occupancy by owners of their units and the common areas—will usually be upheld if the rules are "reasonable, consistent with the law, and enacted in accordance with the bylaws."
2. The courts "have adopted a hardline approach and have upheld ...rules as to dogs, even to the exclusion of dogs, as being reasonable and enforceable. The courts stress that communal living requires that fair consideration must be given to the rights and privileges of all owners and occupants of a condominium association to provide a harmonious residential atmosphere."
3. "Under the current [Maryland Condominium Act], a council of unit owners may delegate its powers of administration or management to a board of directors which may in turn make reasonable rules and regulations concerning conduct, not inconsistent with the Master Deed and Declaration and bylaws, including the regulation or prohibition of pets."

Mountain Manor Realty v. Buccheri, 55 Md.App. 185, 461A.2d 45 (Md. App. 1983):

1. A single surviving member of a corporation's 3-member board of directors has the right to appoint directors to fill the two vacant seats on that board even though there was no quorum. Such an action is permitted by Section 2-407 of the Maryland Corporations & Associations Article.

2. “It is well established that courts generally will not interfere with the internal management of a corporation at the request of a minority stockholder or member. The conduct of the corporation’s affairs is placed in the hands of the board of directors and if most of the board properly exercises its business judgment, the directors are not ordinarily liable. The key word, of course, is ‘properly.’ Although courts are generally enjoined from substituting their judgment for that of the directors as to the economic wisdom of business decisions made by the board, they can, in an appropriate case, examine whether, in making those decisions, the directors abided by the relevant ground rules.”

3. The actions of a board member that are intended to increase her control over the corporation are not necessarily invalid simply because they benefit her. “If the court finds that the transaction was, on the whole, motivated by a legitimate corporate purpose, it should declare the sale to be valid; if it finds to the contrary—that the purpose of the transaction was primarily one of management’s self-perpetuation and that that purpose outweighed any other legitimate business purpose—it should declare the sale to be invalid.”

[Staff comment: this decision did not involve either a common ownership community or a non-profit corporation, and a court might be stricter in reviewing a decision made by such a corporation. None the less, the court’s ruling shows that the decision of a governing body is not automatically invalid simply because it involved a conflict of interest on the part of one of the directors, and that the real issue is the extent to which the association benefits from the action despite the conflict.]

Souza v. Columbia Park and Recreation Association, 70 Md. App 655, 522 A.2d 1376 (Md. App. 1987):

The member disputed the right of his community to prevent him from subdividing his lot into 4 smaller lots that he could build homes on and sell. The member argued that he had the right to do so because the County issued him a permit to subdivide. The court ruled:

1. Government approval to subdivide a lot in a homeowner’s association does not override association covenants preventing such subdivision; homeowners who are subject to such covenants must obey those rules as well as obey the relevant laws.

2. A community rule on architectural applications is not unenforceable simply because it is vague and does not explicitly state all the criteria that it will apply. Rather, the board's enforcement of that rule will be upheld so long as the board's refusal to approve an application was made with a reasonable basis, in good faith, and not arbitrarily.

Markey v. Wolf, 92 Md.App.137, 607 A.2de 82 (1991):

The buyers of a home in an HOA sued the developer for putting up smaller and cheaper homes than the original homes in the community. The Court upheld the developer’s decision claiming it might benefit the association by allowing the sale of more homes and lots and so prevent the failure of the development for lack of buyers.

1. The Declaration states that it is intended to promote a general plan of development and to benefit the property and the owners of the lots. Therefore, the Declaration can be enforced by the developer and by the lot owners.

2. “In 1957, the Court of Appeals adopted the reasonableness rule with respect to the *disapproval of plans*.... We note, however, that public policy and the rules of construction with respect to restrictive covenants do not require that disapprovals and approvals should necessarily be treated equally.... As we see it, the disapproval of a building plan might be a restraint on the free use of land and can adversely affect its alienability. The reasons for disapproval, therefore, should be very closely scrutinized. On the other hand, approval of building plans does not interfere with the unrestricted use of property nor with the ‘freedom of property.’ . . . Accordingly, . . . the approving authority might well be able to give a liberal interpretation of the term’s meaning when approving plans and a less liberal construction in the case of the disapproval of plans.” This is especially the case when the Declaration allows the developer to amend or change the terms of the Declaration.

***Black v. Fox Hills North Community Association*, 599 A.2d 1228 (Md. App. 1992):**

Black sued his HOA and his neighbors to prevent the construction of a fence by the neighbors that the HOA had decided to permit. The HOA argued that the case was frivolous, and that Black should be ordered to reimburse it for its legal fees. The Court ruled as follows:

1. Although a board's decision to enforce a rule, or to deny an architectural application, is governed by the "reasonableness" rule of *Kirkley v. Seipelt* (see above), the board's decision *not to enforce a rule* against a particular homeowner, and its decision to allow an architectural change, is governed by the "business judgment" rule, and must be upheld if it is "a legitimate business decision of an organization, absent fraud or bad faith." "Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. The association was under no obligation to [force the homeowner to remove the fence]. There was no allegation of fraud or bad faith. Absent fraud or bad faith, the decision to approve the fence was a business judgment with which a court will not interfere."

2. The award of attorney fees as a penalty for bringing or defending a lawsuit “without substantial justification” or in bad faith is an exceptional remedy, intended to reach only “intentional misconduct.” It is not intended to penalize a party or its attorney for asserting a colorable claim or defense. The rule does not apply simply because a complaint fails to state a cause of action or because a party misconceives the legal basis upon which he seeks to prevail. (The Court reversed the decision of the trial court to award attorney fees.)

***Ridgely Condominium Association v. Smyrnioudis*, 681 A.2d 494 (Md. 1996):**

1. The members of an association lack the authority to adopt a rule that conflicts with the declaration of covenants.

2. A rule that limits the access of the owners of the business units of a condominium to the main lobby of the building violates the covenant that all members of a condominium,

business as well as residential, are entitled to equal use of and equal access to the common elements.

Mikolasko v. Schovee, 124 Md. App 66, 720 A.2d 66 (Md. Sp.App. 1998):

The association has the legal right to reject a member's plan to subdivide his lot even though the County issued subdivision approval and the new plats were properly recorded in the land records. "The [members] have misunderstood the principle that zoning regulations and restrictive covenants are two concurrent but separate systems of law. . . . Provided that private covenantal rights do not violate local governmental land use restrictions, the land use restrictions will not affect the private covenantal rights." The member of an association must obey both the local law and the covenants of his association.

Colandrea v. Wilde Lake Community Association, 761 A. 2d 899 (Md. 2000):

1. A homeowner association can deny permission to a homeowner to turn a home into a group home for the disabled, so long as the board's decision is a reasonable exercise of its discretion on good faith, based upon legitimate concerns regarding the impact of the facility upon the surrounding neighborhood, and it can do so even though the homeowner has approval from and support of the relevant government agency.
2. Courts can enforce restrictive covenants by injunction.
3. Although a court can refuse to issue an injunction enforcing a restrictive covenant on the basis hardship", the judge must consider whether the party trying to avoid the covenant had truly made an "innocent mistake" or whether he should have known about the covenants, and the effect of the violation upon the neighboring homes.
4. Lots in homeowner associations are subject not only to governmental land use restrictions but also to community covenants, and so must comply with the more restrictive of either the regulations or covenants.

Moshyedi v. Annapolis Road Medical Center 752. A.2d 279 (Md. Special Appeals 2000):

1. A unit owner cannot refuse to pay assessments because the condominium has failed to repair the common elements;
2. A condominium cannot refuse to make repairs to a unit because the unit's owner has refused to pay assessments.
3. Insurance payments to a condominium are common property and all owners share in the surplus, if any, according to their shares of ownership.
4. If a condominium fails to make the necessary repairs to a unit, it has violated its legal duties and the unit's owner can sue it for damages.

Werbowsky v. Collomb, 362 Md. 581, 599, 766 A.2d 123, 133 (Md. 2001) and *Danielewicz v. Arnold*, 137 Md. App. 601, 620, 769 A.2d 274, 285 (Md. App. 2001):

The directors of a corporation have a fiduciary duty to the corporation and its stockholders as a group, but the directors are not fiduciaries or trustees for individual stockholders. *City of Bowie v. MIE Properties Inc.*, 922 A.2d 509 (Md. 2007):

1. A zoning ordinance does not override or defeat a restrictive covenant that also governs the land; when a zoning law and a private restrictive covenant are in conflict, the more restrictive of the two will prevail.
2. for the doctrine of "waiver" to apply, there must be proof of some word or act by one party to the other party representing that the covenant in question would not be enforced;
3. an oral waiver cannot be relied on when the governing rules require that all waivers be in writing;
4. for estoppel to apply, the party seeking to benefit from the estoppel must show that the other party was aware of the violation and did nothing to prevent it;
5. for a party to be excused from a violation under the doctrine of "comparative hardship", the party must show that he committed the violation innocently or mistakenly, and the covenant would cause much greater harm to him than the other party would suffer if the covenant were not enforced.

NAACP v. Golding, 342 Md. 663, 679 A.2d 554 (Md. 1996):

1. Courts have a limited role in resolving the internal disputes of both corporations and unincorporated associations. "The rule is that when the tribunals of the [association] have the power to decide a disputed question, their jurisdiction is exclusive, and the Courts cannot be invoked to review their decisions of questions coming properly before them, except in cases of fraud. In this context, we have interpreted "fraud" to include "action unsupported by facts or otherwise arbitrary . . . As in the case of corporations, decisions of the unincorporated organization are insulated from judicial review absent fraud, irregularity, or arbitrary action. . . We note that if an organization acts inconsistently with its own rules, its action may be sufficiently arbitrary to invite judicial review."
2. "The policy of minimizing judicial involvement in private organizations does not mean that members have no guarantee of procedural fairness. We have historically taken the view that members in a private organization are entitled to at least rudimentary procedural protections such as notice and an opportunity to be heard, before they may be expelled or deprived of other important membership rights. If the organization's adjudicatory procedure does not afford the member these minimal protections, or if the organization provides no avenue for internal review or appeal, then judicial intervention may be appropriate."

3 The board's interpretation of its own documents will be upheld by the courts if the interpretation is a reasonable one.

[Staff comment: this case does not involve a common interest association but does involve a nonprofit association, and common interest associations are also nonprofits. If anything, a court is likely to apply standards at least as strict, if not stricter, to common ownership communities as it did in this case because members of such communities cannot easily leave the organization.]

Mikolasco v. Schovee, 720 A.2d 1214 (Md. App. 1998):

1. A general plan of development recorded in the land records that includes the lot in question will bind and control that lot even though the deed for that lot fails to disclose the restrictions.
2. Although the owner of a lot might lawfully subdivide the lot in accordance with County law, that approval did not create a right to construct an additional home on the subdivided lot in violation of the restrictive covenants. "Zoning regulations and restrictive covenants are two concurrent but separate systems of law."

Tackney v. United States Naval Academy Alumni Association, Inc., 408 Md. 700, 966 A.3d. 900 (Md. 2009):

1. In a case involving a nonprofit, voluntary corporation, "we shall apply the business judgment rule and intervene in the dispute at hand only if the Board's actions were fraudulent or arbitrary. We do not consider actions pursued in good faith, in purported compliance with the Association's Bylaws, to be fraudulent or arbitrary"
2. When interpreting the governing documents of an association, the language of the document is only ambiguous if it is susceptible to more than one meaning. A member's interpretation of the document may be plausible, but that does not prevent the existence of other reasonable interpretations. If the Board's interpretation is also reasonable, then it cannot be said that the Board acted in an arbitrary fashion.
3. The business judgment rule applies to Board decisions even if those decisions have the effect of restricting the voting rights of the membership.
4. Maryland law permits directors to participate in transactions in which they may have conflicting interests provided that such conflicts are known to other board members and the transaction is ultimately approved by a majority of disinterested directors.

[Staff comment: there appears to be some conflict between this decision by Maryland's highest Court and the more recent decision of the lower court in *South Kaywood CA v. Long*.]

Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, 201 Md. App. 186, 29 A.3d 604 (Md.App. 2011)

1. The failure of a board of directors to decide is not protected by the business judgment rule.
2. Unit owners may sue their association for negligence when the association knows of the existence of defects but fails to take any action against the builder before the statute of limitations runs out on the association's claims.

MRA Property Management Inc. v. Armstrong, __Md.__ (2011) (No. 93, September Term 2007).

1. The members of a condominium association may sue both their association and its manager for damages under the Maryland Consumer Protection Act for the failure to disclose material facts in connection with a consumer transaction, when the association and its manager distributed resale packages which did not disclose serious defects in the common areas which the association and the manager know about, even though the association and the manager were not sellers of the units.
2. The duty to disclose known defects in a resale package is not limited to defects of which the association has been formally charged by a government agency as violating health or building codes.
3. The association does not have a duty to disclose contemplated or proposed capital expenditures which are not listed in the current budget, but only those which have been approved by the association.

Tracey v. Solesky, 427 Md. 627 (2012):

Pit bull dogs are inherently dangerous. Therefore, a landowner is strictly liable for any injuries caused by a pit bull which it knows is on its premises, even if it has no knowledge that the pit bull is dangerous.

[Staff comment: Under this ruling a common ownership community is liable for any injuries caused by a pit bull owned by any of its members or residents. See discussion in the *CCOC Communicator* for Fall, 2012. However, this decision was modified by a new law, in Courts & Judicial Proceedings Section 3-1901, under which associations are not

liable for dog bites unless the association was on knowledge that the dog had already bit someone else or otherwise acted dangerously.]

South Kaywood Community Association v. Long, 208 Md. App. 135 (Sp. App. 2012)

The HOA charged the member, who was also a landlord, with violating its covenant against the use of a home for anything except as a “single family” residence when he attempted to rent the home to three college students who were not related to each other by blood, marriage or adoption. There was no definition of the word “family” in the HOA’s governing documents and the board interpreted the term to mean people related by blood, marriage or adoption. The Court of Special Appeals ruled in favor of the member-landlord. It stated that there was no generally-accepted agreement on the meaning of the word “family” and it noted that the local zoning laws defined “single family” as a group of people who simply shared a house together. The Court went on to say that since the words “single family” were “ambiguous,” and because the HOA was trying to enforce a restrictive covenant, the Court would interpret the words broadly and against the HOA. The Court held that the 3 college students sharing a single household were a “single family” and the landlord did not violate the covenant.

[Staff note: The Court in this case did not mention the higher court’s decision in *Tackney v. U.S. Naval Academy*, above. In the staff’s view, it’s not clear how these two rulings can be reconciled.]

Reiner v. Avenel Community Association Inc., __ Md.App. __ (2013)

1. The trial court dismissed a complaint filed against the individual members of the HOA’s board of directors and awarded the HOA its legal fees for the motion to dismiss as a penalty against Reiner. Suing individual board members is prohibited by the Maryland Code unless specific claims can be made against them.

2. The general rule under Maryland law is that decisions made by an HOA board of directors will not be changed by a court unless there is proof of fraud or bad faith. In this case, the member claimed that the HOA’s new rule on roofing materials violated the County Fire Code, but the member failed to produce any evidence to support the claim.

3. “Even if” the court were required to apply “close scrutiny” under *Markey v. Wolf* [see above] to review an HOA’s denial of an architectural application, the member’s claim in this case still fails. The HOA showed that its decision was related to an overall plan for the community and had a relationship to other homes in the community, and there was no evidence that the decision conflicted with the higher law of the County Fire Code, or that it was affected by fraud or bad faith.

USING GOOD JUDICIAL JUDGMENT: DISPENSING WITH
THE BUSINESS JUDGMENT RULE IN MIXED- USE
COMMUNITY ASSOCIATION DISPUTES

I. INTRODUCTION

Community associations in America are becoming increasingly popular.¹ In addition to their widespread growth throughout the country, community associations are fundamentally changing. Whereas the traditional community association consisted of purely residential members, projects are now becoming more and more mixed use.² Mixed-use projects feature a combination of retail and other commercial operations in addition to the traditional residential development.³ Since they hit the scene in the 1970s, residential community associations have presented courts with numerous disputes with which judges have wrestled to develop a wide body of case law.⁴ While jurisdictions took different approaches to residential community association disputes, reasonably predictable and coherent law emerged from jurisdiction to jurisdiction. Perhaps fatigued, courts in many jurisdictions are applying the same body of case law and corresponding standards of review to mixed-use association disputes, rather than looking critically at the fundamentally different beast that is now stalking the land.⁵

In Vail, Colorado, a group of retail unit owners known as the Lodge Retailers Association (“LRA”) brought an action against their mixed-use condominium association, the Lodge Apartment Condominium Association (“LACA”) for assessing maintenance fees for elements the LRA claimed were uncommon.⁶ The mixed-use condominium consisted of seventy-four units; fifty-nine were for residential purposes, and fifteen were for retail purposes.⁷ In addition to the retail and residential presence in the building, a luxury hotel

1. Janet M. Bollinger, Comment, *Homeowners’ Associations and the Use of Property Planning Tools: When Does the Right to Exclude Go Too Far?*, 81 TEMP. L. REV. 269, 275 (2008).

2. Roger D. Winston, *Achieving Vertical and Horizontal Integration—Challenges of Mixed-Use Development*, PROB. & PROP., Mar./Apr. 2007, at 38, 38, available at http://www.ballardspahr.com/files/tbl_s29GeneralContent/PDFfile2223/66/Attachment7.pdf.

3. *Id.*

4. See *infra* Part II.B for a discussion of residential community association law.

5. See *infra* Part III.A.2 for an argument that courts do not distinguish between mixed-use and residential community associations.

6. Opening-Answer Brief of Plaintiff-Appellee/Cross-Appellant Lodge Retailers Ass’n at 5–8, *Lodge Retailers Ass’n v. Lodge Apt. Condo. Assn’s, Inc.*, No. 05 CA 1864 (Colo. Ct. App. Jan. 8, 2006). The Author assisted the Lodge Retailers Association in this litigation in his capacity as a paralegal for LRA’s counsel. Some of the statements in notes 6–13 and accompanying text are derived from this firsthand experience.

7. *Id.* at 5.

known as the Lodge at Vail (“Hotel”) was interconnected to the condominium, sharing a lobby, walls, and a pool and spa facility.⁸ The LACA board hired the Hotel as the association’s managing agent.⁹ In its capacity as managing agent, the Hotel, with the approval of the LACA board, rolled several hotel-related expenses into the association’s common elements, such as the pool and front desk, and expenses in connection with a vacation rental program.¹⁰ The LRA claimed that they received no benefit from the assessment scheme.¹¹ The obligation to pay for the hotel-related expenses resulted in considerable diminution in the value of their retail units.¹² The LRA thus sought, *inter alia*, declaratory judgment and restitution for overpayment of past expenses.¹³

The LRA, a minority class subject to the will of the residential majority, faced a daunting litigation because of Colorado’s decision—or lack thereof¹⁴—to apply the business judgment rule (“BJR”) in the context of mixed-use community association disputes.¹⁵ The LRA convinced a jury that the assessment scheme was exploitative of minority commercial interests, but ultimately the board and association prevailed because of the BJR defense.¹⁶ The trial court afforded BJR protection to the board’s decision to enter the management agreement with the Hotel, which was a complete defense to LRA’s claims.¹⁷

Colorado and a minority of other states, who use the BJR in the context of mixed-use community association disputes, leave minority membership classes little recourse through the courts to ensure their reliance interests in them

8. *Id.* at 6–7.

9. *Id.* at 5.

10. *Id.* at 5–8.

11. Response to Motion for Judgment Notwithstanding the Verdict at 5, *Lodge Retailers Ass’n v. Lodge Apt. Condo. Ass’n, Inc.*, No. 03 CV 264 (Colo. Dist. Ct. Eagle County July 21, 2005).

12. Plaintiff Lodge Retailers Ass’n’s Initial C.R.C.P. 26(a)(2) Disclosures and Reservation of Rights at Exhibit B, *Lodge Retailers Ass’n v. Lodge Apt. Condo. Ass’n, Inc.*, No. 03 CV 264 (Colo. Dist. Ct. Eagle County Apr. 13, 2004) [hereinafter Plaintiff’s Initial Disclosures].

13. Opening-Answer Brief of Plaintiff-Appellee/Cross-Appellant Lodge Retailers Ass’n, *supra* note 6, at 2.

14. See *infra* Part III.A for a discussion of how courts fail to distinguish between residential and mixed-use community associations for purposes of BJR application.

15. *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. Ct. App. 1974) (recognizing business judgment rule in Colorado).

16. Opening-Answer Brief of Plaintiff-Appellee/Cross-Appellant Lodge Retailers Ass’n, *supra* note 6, at 10; see also Edward Stoner, *Lodge at Vail Stores in Court over Fees*, VAIL DAILY, Apr. 16, 2006, available at <http://www.vaildaily.com/article/20060416/NEWS/104160045> (reporting on trial court judgment).

17. Opening-Answer Brief of Plaintiff-Appellee/Cross-Appellant Lodge Retailers Ass’n, *supra* note 6, at 10. Whether the BJR specifically protects a community association board’s decision to enter into a management agreement was recently before the Colorado Supreme Court on a petition for writ of certiorari. Reply in Support of Petition for Writ of Certiorari at 1, *Lodge Apt. Condo. Ass’n, Inc. v. Lodge Retailers Ass’n*, No. 07SC1092 (Colo. Jan. 22, 2008). The Colorado Supreme Court, however, declined to address the issue and denied the petition. *Lodge Apt. Condo. Ass’n, Inc. v. Lodge Retailers Ass’n*, No. 07SC1092, 2008 WL 2486399, at *1 (Colo. June 23, 2008).

properties.¹⁸ This Comment critiques courts in BJR jurisdictions for failing to distinguish between purely residential communities and mixed-use projects in fashioning a standard of review.¹⁹ It further argues that boards of mixed-use projects deserve less judicial deference than the BJR generally requires courts to give.²⁰ Instead of the BJR in the mixed-use context, courts should implement a reasonableness standard that allows them to properly balance the competing interests at stake.²¹

To fully appreciate the problem with applying the BJR to mixed-use community association disputes, it is necessary to understand the evolution of the BJR doctrine beginning in the corporate context and then its adoption in the community association setting. Accordingly, Part II of this Comment reviews the beginnings of the BJR in the for-profit corporate setting and then explores the BJR in residential community associations. That discussion details various rationales offered to support the BJR in the residential community association context. This Comment then looks at the leading alternative to the BJR, known as the reasonableness standard, which is the standard a majority of jurisdictions use in the community association context. Part II concludes with a discussion of the mixed-use community association and analyzes various disputes that arise. It also juxtaposes the BJR with the reasonableness standard as a means of resolving community association disputes in the mixed-use project.

Part III of this Comment highlights the problems with applying the BJR to the mixed-use community association and further argues that each rationale concerning the BJR's deferential approach is inapplicable to the mixed-use project. This Part argues that the reasonableness standard is preferable to the BJR in the mixed-use context because it allows minority owners, legitimately harmed, adequate recourse through the courts. To illustrate the BJR's ineffectiveness in the mixed-use setting, Part III concludes by applying the BJR to the facts of a real-life dispute taken from a case in Maryland, a jurisdiction that uses the reasonableness standard.

II. WALL STREET TO MAIN STREET: THE BUSINESS JUDGMENT RULE COMING SOON TO A COMMUNITY NEAR YOU

To understand the role of the BJR in mixed-use disputes—and to understand why it is inappropriate—it is helpful to consider the evolution of the doctrine, starting first with its birth in the for-profit corporate setting. As residential community associations first became popular and disputes arose, courts struggled to find and adopt a framework of adjudication that adequately

18. See *infra* Part III.B for an illustration of how the BJR fails to protect minority reliance interests.

19. See *infra* Part III.A for a critique of courts' failure to distinguish between residential and mixed-use community associations.

20. See *infra* Part III.A for arguments that courts should be less deferential to decisions of mixed-use associations' boards.

21. See *infra* Part III.B for an illustration of the reasonableness standard's superiority over the BJR in the mixed-use context.

balanced the interests involved.²² The corporate BJR standard and the less deferential reasonableness standard emerged as the two main judicial approaches.²³ Accordingly, Parts II.B and II.C provide a discussion of these standards of review in the residential context. Mixed-use community associations are the latest advancement in community projects and Part II.D explores the trends courts are taking when dealing with mixed-use disputes.

A. *The Business Judgment Rule's Birth in the Corporate Setting*

1. What Is the Business Judgment Rule?

"The business judgment rule is one of the most fundamental doctrines in corporate law."²⁴ Underlying corporate law in America is the notion that directors, rather than shareholders or judges, manage the business affairs of the corporation.²⁵ In fact, this elemental understanding of corporate management is codified in several jurisdictions, including Delaware.²⁶

The BJR functions primarily as a judicial presumption that directors make business decisions "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."²⁷ Under the BJR, directors are generally free of liability due to "imprudence or honest errors of judgment."²⁸ Traditionally, to overcome the presumption, a plaintiff had to present sufficient evidence that a director, or the board as a whole, breached "any one of the triads of their fiduciary duty—good faith, loyalty or due care."²⁹ Because a director cannot act in bad faith and at the same time fulfill her duty of loyalty, the Delaware Supreme Court dispensed with the triad approach and now treats good faith as a subset of the duty of loyalty.³⁰

22. See Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 11–18 (1995) (discussing varying judicial approaches to fashioning standards of review in community association context).

23. *Id.*

24. Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1439 (1985).

25. See *Aronson v. Lewis*, 473 A.2d 805, 811–13 (Del. 1984) (providing formulation of BJR in Delaware), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

26. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2001) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . .").

27. *Aronson*, 473 A.2d at 812.

28. JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 10.01, at 184 (2d ed. 2003) (citing *In re Reading Co.*, 711 F.2d 509, 517–18 (3d Cir. 1983)); see also *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) (noting that BJR "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes").

29. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (emphasis omitted) (citing *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Aronson*, 473 A.2d at 812)).

30. Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1777–79 (2007) (citing *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006); *In re*

The BJR commonly applies to derivative actions brought by minority shareholders against the directors of the corporation to challenge a particular decision.³¹ Rather than a review of the merits of claims or the reasonableness of a particular board decision, the BJR requires only a process-based analysis.³² In *Brehm v. Eisner*³³ the Delaware Supreme Court acknowledged this process-based approach:

Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is *process* due care only. Irrationality is the outer limit of the business judgment rule. Irrationality . . . may tend to show that the decision is not made in *good faith*, which is a key ingredient of the business judgment rule.³⁴

The BJR is thus a highly deferential standard of judicial review, not a proclamation of a standard of care for directors.³⁵

Although the BJR has unique application in certain derivative situations, its governing principles concerning scope are universal.³⁶ First, the protections of the BJR are only available to disinterested directors.³⁷ In this regard, "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing."³⁸ Second, the BJR does not protect directors who breach their duty of care, which typically concerns whether the board "inform[ed] themselves . . . of all material information reasonably available to them."³⁹ According to the *Aronson* court, directors' liability with respect to their failure to consider adequate information is predicated on the concept of gross negligence.⁴⁰ In some jurisdictions, action beyond gross negligence approaching criminal is required before the imposition of liability.⁴¹ Finally, the BJR operates only in the context of director action; it has no operation where a *conscious choice* was not made.⁴²

Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–68, 970 (Del. Ch. 1996)) (discussing evolution of duty of good faith into duty of loyalty in Delaware corporate law).

31. See *Auerbach*, 393 N.E.2d at 1002 (noting that decisions "weighing and balancing . . . legal, ethical, commercial, promotional, public relations, and fiscal" factors fall within BJR).

32. *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000); COX & HAZEN, *supra* note 28, § 10.01, at 184.

33. 746 A.2d 244 (Del. 2000).

34. *Brehm*, 746 A.2d at 264 (second emphasis added) (footnotes omitted).

35. COX & HAZEN, *supra* note 28, § 10.01, at 184 (noting that liability of director whose conduct falls short of industry norm depends on BJR assessment).

36. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

37. *Id.*; see also *Gries Sports Enters., Inc. v. Cleveland Browns Football Co.*, 496 N.E.2d 959, 964 (Ohio 1986) (discussing scope of BJR under Delaware law).

38. *Aronson*, 473 A.2d at 812.

39. *Id.*

40. See *id.* at 812 & n.6 (noting that standard is less exacting than simple negligence).

41. *FDIC v. Gonzalez-Gorron dona*, 833 F. Supp. 1545, 1556 (S.D. Fla. 1993) (noting Florida legislature permits liability only for acts constituting more than gross negligence).

42. *Aronson*, 473 A.2d at 813 (noting that BJR may protect conscious decision to refrain from action).

When the BJR's presumption applies, courts look only to whether the requisite procedural requirements were met and do not turn to the substance of the decision.⁴³ For example, in *Auerbach v. Bennett*⁴⁴ the board of directors convened a special committee to investigate a derivative action.⁴⁵ The board decided to terminate the derivative action based on the committee's findings that the continued pursuit of the litigation was not in the best interest of the company.⁴⁶ The court extended BJR protection to the board's decision because there was no evidence that the special committee was "interested," and the court was satisfied with the extent of the committee's investigation.⁴⁷

2. Why the Businesses Judgment Rule?

There are many practical and economic rationalizations in support of the BJR and its general charge of judicial deference to board decision making. Underlying all such rationalizations is the notion that "liability rules enforced by shareholder litigation play a relatively minor role in aligning the interests of managers with those of shareholders," and therefore imposing liability on corporate decision makers is an ineffective regulatory tool.⁴⁸ There are several reasons for this observation, put forth in both scholarship and case law: first, courts should apply a deferential standard of review to business decisions to avoid risk-averse behavior in the boardroom;⁴⁹ second, courts are ill equipped to review business decisions;⁵⁰ third, existing internal checks on director and manager behavior sufficiently reduce the need for legal liability;⁵¹ and fourth, minority shareholders have a small incentive to maximize aggregate firm value.⁵²

43. See *Auerbach v. Bennett*, 393 N.E.2d 994, 1002 (N.Y. 1979) (refusing to inquire into merits of decision, but making inquiry into quality of investigation procedures).

44. 393 N.E.2d 994 (N.Y. 1979).

45. *Auerbach*, 393 N.E.2d at 1000.

46. *Id.*

47. *Id.* at 1001-02.

48. Fischel, *supra* note 24, at 1439 (noting that broad jurisdictional adoption of BJR is evidence of limited role of liability rules); see also Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 573 (acknowledging lack of definitive answers to questions regarding BJR rationale).

49. Fischel, *supra* note 24, at 1439; see also Davis, *supra* note 48, at 573-78 (listing risk allocation as first of several policy considerations in support of BJR).

50. Davis, *supra* note 48, at 580-83 (addressing "expertise" and "imperfect litigation" rationales); Fischel, *supra* note 24, at 1439; see also Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (noting "after-the-fact litigation is a most imperfect device to evaluate corporate business decisions"); *Auerbach*, 393 N.E.2d at 1000 (noting director experience "peculiarly" qualifies them to render decisions and courts should defer).

51. Fischel, *supra* note 24, at 1442-43; see also Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 387-90 (1983) (noting interests of senior managers are aligned with shareholders because large percentage of wealth is tied up in corporation); Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 559-60 (1984) (noting executive compensation agreements link managers to firm performance).

52. Fischel, *supra* note 24, at 1442-43.

The risk allocation argument turns on the fact that shareholders are well positioned to endure risk because of their ability to diversify and invest in many firms.⁵³ Managers and directors are hired for the purpose of growing shareholder investments, which often demands that business decision makers take risks.⁵⁴ Exposing managers to liability for their business decisions will cause them to avoid risk, which is “precisely the opposite of how shareholders, the superior risk bearers, want their managers to act.”⁵⁵

Another rationale states that “business judgments are for the business experts—the directors and management—and judges and juries are ill-equipped to review them.”⁵⁶ A natural corollary to this argument is the imperfect litigation argument, which suggests that ex post review of business decisions, taking place years later, is inadequate.⁵⁷ One scholar suggested that the limited cognitive resources available to the judiciary is reason for abstention.⁵⁸ Professor Bainbridge suggests that judges, like any rational decision maker faced with complexity and ambiguity in an area with which she is largely inexperienced, will actually attempt to minimize her efforts and adopt short-hand rules.⁵⁹ Such a process cannot fairly evaluate and recreate all the factors and circumstances surrounding directors when they render their decisions and thus the BJR is necessary because it limits unfair and inefficient substantive review of a decision.⁶⁰

The internal checks rationale focuses on the futility of using legal liability to regulate manager and director behavior in light of built-in corporate controls.⁶¹ Senior management and directors generally have a considerable amount of their wealth invested in the company, which aligns their interests with those of the shareholders at large.⁶² Furthermore, because executive compensation

⁵³ *Joy*, 692 F.2d at 885–88; Fischel, *supra* note 24, at 1442–43.

⁵⁴ See Davis, *supra* note 48, at 574–75 (arguing that “even the most potentially profitable of business decisions” involve some sort of risk); Fischel, *supra* note 24, at 1442–43 (suggesting that “[i]f shareholders wanted to avoid risk, they could have purchased government bonds rather than shares of stock”).

⁵⁵ Fischel, *supra* note 24, at 1442.

⁵⁶ Davis, *supra* note 48, at 580–83; Fischel, *supra* note 24, at 1439.

⁵⁷ *Joy*, 692 F.2d at 886 (noting that circumstances surrounding business decisions are not easily reconstructed in light of need for speedy decision based on less than optimal information). But see *Smith v. Van Gorkom*, 488 A.2d 858, 880 (Del. 1985) (finding gross negligence because board approval of merger involving offer over double share price was not product of informed business judgment), *overruled by* *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009). Delaware courts have considerably retreated from the less deferential standard of review. See *Emerald Partners v. Berlin*, 787 A.2d 85, 90–92 (Del. 2001) (discussing judicial and legislative response to *Van Gorkom*).

⁵⁸ Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 118–20 (2004).

⁵⁹ *Id.* Professor Bainbridge admits that this is an incomplete argument for application of the BJR and offers several other rationalizations in support of his thesis that courts should use the BJR as reason to abstain from reviewing business decisions not tainted by self-dealing and fraud. *Id.* at 120–24.

⁶⁰ *Joy*, 692 F.2d at 886.

⁶¹ See *supra* note 51 for sources discussing the internal checks rationale.

⁶² Demsetz, *supra* note 51, at 387–90; see also Donald C. Langevoort, *Resetting the Corporate*

agreements typically link compensation to firm performance, there exists a sufficient market-based incentive to ensure diligent and thorough decision making.⁶³ Finally, career mobility and job security, which depend on the success of the firm, will motivate managers and perhaps directors as well, to make good decisions in the best interest of the company.⁶⁴ Imposition of liability rules on management and directors is unnecessary and inefficient, making the BJR's deferential approach appropriate.⁶⁵

Lastly, the fact that minority shareholders have a weak incentive to maximize the value of the company relative to directors and managers suggests that courts should use a standard of review that places a considerable burden on the complaining minority.⁶⁶ Although minority shareholders have little power to "thwart the will of the majority," they are not disadvantaged because they too benefit by placing decision-making authority within the hands of the most invested.⁶⁷ With a small stake in the firm, a complaining minority shareholder will have little incentive to consider the adverse consequences for shareholders as a class, namely, the likely possibility that manager and director behavior will tend toward risk aversion.⁶⁸

B. *Business Judgment Rule Application in Residential Community Associations*

In the context of residential community associations, a minority of jurisdictions apply the BJR when reviewing disputes brought by association members against association board action, while the majority use a reasonableness standard.⁶⁹ In either case, courts acknowledge the unique environment of community associations and attempt to follow a standard of review suited to address their unique problems.⁷⁰ Part II.B.1 first discusses the

Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls, 93 GEO. L.J. 285, 295–96 (2004) (noting that corporate officers are motivated by equity incentives).

63. Fischel, *supra* note 24, at 1442–43.

64. *Id.* (noting that pervasive internal and third-party monitoring of manager and director conduct safeguards shareholders from poor decision making). *But see generally* David A. Hoffman, *Self-Handicapping and Managers' Duty of Care*, 42 WAKE FOREST L. REV. 803 (2007) (discussing legal implications on duty of care of executive self-handicapping to preserve elite position in firm).

65. Fischel, *supra* note 24, at 1442–44 (concluding that role of contract and market mechanisms reward good and penalize inferior business behavior).

66. *Id.* at 1443–44 (noting that one-share-one-vote ensures that those with most at stake control corporate decision making). This theory of course addresses only those claims and actions instituted by minority shareholders.

67. *Id.* at 1443 (citing Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983)).

68. *Id.*

69. *See, e.g.*, *Mulligan v. Panther Valley Prop. Owners Ass'n*, 766 A.2d 1186, 1190–91 (N.J. Super. Ct. App. Div. 2001) (discussing state of community association law around country); Arabian, *supra* note 22, at 11–12 (providing discussion of standards of review in jurisdictions and noting majority adopt reasonableness standard).

70. *See Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (discussing condominium arrangement as distinct from others in country).

emergence of the community association and its legal structure, while Parts II.B.2 and II.B.3 explore the most common disputes in the community association context. The manner in which courts apply the BJR in the residential community association context is then presented in Part II.B.4, with particular attention to the three main elements of the BJR, namely, that association boards must act within their powers, that they must act in good faith, and that boards must respect their fiduciary duties to the association. To close, Part II.B.4.d presents the prevailing rationales supporting application of the BJR in the residential community association context.

1. The Rise of the Community Association

Most community associations, such as condominiums and cooperatives, are created by a developer, not through direct agreement of neighboring real property owners.⁷¹ The developer drafts and records a declaration of covenants, together with by-laws, which serve as the governing documents of the community association and bind every unit owner upon purchase.⁷² The governing documents empower the association board to manage the community association and to impose restrictions on owners while overseeing association affairs.⁷³ The governing documents also provide for their own amendment and specify procedures that a board must follow when exercising its powers.⁷⁴ The governing documents are tantamount to a community constitution.⁷⁵

Homeownership in community associations is becoming more widespread throughout the United States, as community associations generally offer a cheaper alternative to detached homes.⁷⁶ Furthermore, because of the community nature of the arrangement, owners can rely on boards to handle some of the typical obligations of homeownership, such as “maintenance, roof repair, [and] lawn mowing.”⁷⁷ With these benefits, however, come inconveniences, such as limited control over the expenditure of funds⁷⁸ and the

71. Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 277 (1997).

72. *Id.* (citing WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 355–62 (2d ed. 1988)). Further, because the declaration is recorded, all purchasers are at least on constructive notice. Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 840 (1995).

73. Sterk, *supra* note 71, at 277.

74. *Id.* at 277–78.

75. Kress, *supra* note 72, at 840.

76. *Id.* at 839. See *supra* note 1 and accompanying text for a discussion of community association growth.

77. Kress, *supra* note 72, at 839.

78. For example, if a board decides to replace the exterior walls of a building, which requires a special assessment of the membership, an owner who otherwise might have waited until a more financially secure time to do the work would have to contribute her proportionate share nonetheless. See Randolph C. Gwirtzman, Note, *An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions*, 14 CARDOZO L. REV. 1021, 1043 (1993) (discussing how board decision to allocate budget for building-related modifications should receive greater scrutiny by courts).

presence of various use restrictions and regulations both within the home and in common spaces.⁷⁹ Disputes arise between homeowners and the associations that govern them, and courts have struggled to adopt the proper judicial framework with which to address them.

2. Disputes in Community Associations

Disputes arising out of residential community associations generally fall into one of two categories. The first category of disputes turns on whether a board action is beyond the scope of its power from a procedural or contractual perspective, as defined and limited in the governing documents and by applicable state and federal laws.⁸⁰ A board must act within the scope of its powers to realize protection of the BJR and thus many community association disputes in BJR jurisdictions revolve around this question.⁸¹

The second category of disputes concern challenges to the subject matter and substance of the rule itself.⁸² Many of the substantive disputes concern rules that result in a redistribution of market value from one group of units to another.⁸³ These sorts of disputes are common in mixed-use community associations where there is a distinct minority class.⁸⁴ Other disputes concern rules that deprive unit owners of idiosyncratic value—rules that prevent unit owners from indulging their personal tastes.⁸⁵ Courts generally enforce these rules due to the subjective nature of the unit owners' complaints.⁸⁶

3. Competing Interests in Community Associations

There are competing interests in community associations between the individual homeowner's autonomy and the need to ensure the smooth functioning of a common interest community.⁸⁷ Unit owners must cede some of their personal autonomy to the association to facilitate the functioning of the community as a whole.⁸⁸ But courts acknowledge the potential for a board to abuse its power under the governing documents and aim to protect individual

79. Kress, *supra* note 72, at 839–40.

80. Sterk, *supra* note 71, at 282–83.

81. See *infra* Part II.B.4 for a discussion of the application of the BJR in the community association context.

82. Sterk, *supra* note 71, at 284.

83. *Id.* at 320–22.

84. See *infra* Part II.D for a discussion of mixed-use community associations and disputes related thereto.

85. See, e.g., *O'Buck v. Cottonwood Vill. Condo. Ass'n, Inc.*, 750 P.2d 813, 814, 820 (Alaska 1988) (holding community association could ban TV antennae even though unit owner placed considerable value in availability of TV programming).

86. See Sterk, *supra* note 71, at 282–83 (describing cases where association regulations outside scope of covenant were upheld over objections of some owners).

87. Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653, 672–73 (1988).

88. *Id.*

unit owners from boards that enact and enforce rules and regulations through “arbitrary and malicious decisionmaking, favoritism, [and] discrimination.”⁸⁹

Because of the purpose of community associations, which as one scholar points out, is to “enhance the value, desirability and attractiveness of the community,” courts generally enforce association regulations.⁹⁰ Some commentators consider enforcement of association rules and regulations necessary to ensure a stable planned environment and to protect the reliance interests of unit owners who paid a premium for a particular regulatory scheme.⁹¹

4. The Business Judgment Rule as a Standard of Review in Community Association Disputes

A minority of jurisdictions use the BJR as the standard of review for community association disputes.⁹² Such jurisdictions find the analogy of the community association with a corporation persuasive and relate actions of unit owners to derivative actions of shareholders.⁹³

Like the BJR in the corporate context, in community associations the BJR functions in large part procedurally, as its primary focus is on the process of rule making rather than the substance of the rule or regulation itself.⁹⁴ In general, the BJR, like in the corporate context, prevents courts from reaching the merits of claims, and from substituting their judgment or the judgment of unit owners for that of the board.⁹⁵

To ensure BJR protection in the community association setting, like in the corporate context, a board’s action must be (1) authorized under the governing documents or under state or federal law, (2) in good faith and in a legitimate relationship to the welfare of the community association, and (3) in line with its fiduciary obligations to unit owners.⁹⁶ Procedurally, the burden is on the complaining unit owner to allege that the board failed to satisfy at least one of

89. *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1320–22 (N.Y. 1990); *see also id.* at 1320–22 (discussing competing interests involved in community association disputes); Goldberg, *supra* note 87, at 672 (noting that decisional law reflects judicial concern for individual unit owners).

90. Goldberg, *supra* note 87, at 676; *see also* Sterk, *supra* note 71, at 279–81 (discussing courts’ general tendency to enforce covenants and use restrictions contained in condominium association declarations).

91. Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 652–53 (1981) (stating that individuals purchase homes in reliance on promised condominium environment, and providing example of elderly homeowners in retirement condominiums who have interest that children will not move into other units).

92. *Cf. Mulligan v. Panther Valley Prop. Owners Ass’n*, 766 A.2d 1186, 1191 (N.J. Super. Ct. App. Div. 2001) (noting that majority of jurisdictions apply reasonableness standard).

93. Note, *supra* note 91, at 663–64.

94. *Id.* at 666.

95. VINCENT DI LORENZO, *NEW YORK CONDOMINIUM AND COOPERATIVE LAW* § 12:2, at 208 (2d ed. 1995, supp. 2007–2008).

96. *Id.* § 12:3, at 212–13.

the aforementioned requirements.⁹⁷ If the unit owner makes the allegation, the board may justify its action with clear evidence.⁹⁸ If the court is not satisfied with the unit owner's arguments for disregarding the BJR, it will dismiss the claim without reaching the substance of the board's rule.⁹⁹

a. Board Action Within Its Power Receives BJR Protection

A board that acts within the scope of its power can expect to receive the BJR's protection.¹⁰⁰ Alternatively, when a board acts outside the scope of its power, such as by breaching a contract, BJR protection is unavailable.¹⁰¹ In *Rywalt v. Writer Corp.*¹⁰² the Colorado Court of Appeals upheld a board's decision to build a second tennis court where the unit owner alleged that the governing documents failed to grant the requisite authority to the board.¹⁰³ Ignoring the trial court's extensive findings of fact,¹⁰⁴ the court conducted a strict interpretation of the governing documents, noted that all management power was vested in the board, and dismissed the plaintiffs' claims.¹⁰⁵ To justify its holding, the court relied on traditional corporate business authority and stated:

[G]ood faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid. Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties.¹⁰⁶

The Colorado Court of Appeals in *Colorado Homes, Ltd. v. Loerch-Wilson*¹⁰⁷ reinforced and arguably extended the holding in *Rywalt* by affording BJR protection to a board that failed to enforce a covenant in a timely manner in violation of the governing documents.¹⁰⁸ The plaintiff alleged that the board's

97. *Id.* § 12:3, at 213.

98. *Id.* (citing *Cooper v. Greenbriar Owners Corp.*, 657 N.Y.S.2d 994, 994 (N.Y. App. Div. 1997)).

99. *Id.*

100. See DI LORENZO, *supra* note 95, § 12:3, at 213 (noting BJR does not apply if board acts outside scope of its authority).

101. See, e.g., *Whalen v. 50 Sutton Place S. Owners, Inc.*, 714 N.Y.S.2d 269, 271 (N.Y. App. Div. 2000) (rejecting cooperative's claim that breach of contract was protected by BJR); *Business Judgment Rule Does Not Shield Board from Breach of Contract Claim*, N.Y. REAL EST. L. REP., July 2004, at 4, 4 (addressing New York state court holding that BJR is not applicable when unit owner sues cooperative board for breach of contract).

102. 526 P.2d 316 (Colo. Ct. App. 1974).

103. *Rywalt*, 526 P.2d at 317.

104. The trial court found that there were incomplete minutes of meetings, the board used annual meetings only for purposes of electing board members, all board meetings were closed, the board did not submit proposals to the architectural control committee, the board poorly prioritized capital projects, and the board never sought a membership poll. *Id.*

105. *Id.*

106. *Id.*

107. 43 P.3d 718 (Colo. Ct. App. 2001).

108. *Colo. Homes, Ltd.*, 43 P.3d at 723–24.

failure to enforce the use restriction was a breach of contract, but the court nonetheless afforded BJR protection.¹⁰⁹ The court found that the relational nature of the contract implied considerable board discretion with respect to the manner and timing of the enforcement of the restriction against a unit owner and was therefore a decision subject to BJR protection.¹¹⁰

b. Board Action Must Be in Good Faith and Bear a Relationship to the Welfare of the Association

To receive BJR protection, a board must act in good faith, which courts define as any action bearing a legitimate relationship to furthering community association purposes.¹¹¹ Because boards can easily establish some tangential relation to community purposes, a finding of bad faith may turn on whether a board action is the result of a personal vendetta against a unit owner.¹¹² In *Y & O Holdings (NY), Inc. v. Board of Managers of Executive Plaza Condominium*,¹¹³ the board enacted a rule prohibiting occupancy by short-term renters.¹¹⁴ The board enacted the rule only one month after the plaintiff, owner of forty short-term rental units, terminated her brokerage contract with the association's management agent.¹¹⁵ Because the plaintiff alleged that the management agent threatened individual board members to enact the rule, the court found sufficient evidence of bad faith to deny the association's motion for summary judgment.¹¹⁶

The pioneer case adopting the BJR in New York, *Levandusky v. One Fifth Avenue Apartment Corp.*,¹¹⁷ suggests that establishing bad faith might not be as easy as *Y & O Holdings (NY), Inc.* notes. In *Levandusky*, the plaintiff was a unit owner who changed the location of a steam pipe in his kitchen even though the board had denied his request.¹¹⁸ Although the plaintiff sought an opinion from a professional engineer and alleged that the board singled his unit out from others,¹¹⁹ the court refused to consider the possibility of bad faith and extended BJR protection.¹²⁰

109. *Id.* at 720–721, 723–24.

110. *Id.* at 723–24.

111. DI LORENZO, *supra* note 95, § 12:3, at 216.

112. See, e.g., *id.* (citing *Boisson v. 4 E. Hous. Corp.*, 514 N.Y.S.2d 374, 375 (N.Y. App. Div. 1987)).

113. 717 N.Y.S.2d 602 (N.Y. App. Div. 2000).

114. *Y & O Holdings (NY), Inc.*, 717 N.Y.S.2d at 603.

115. *Id.*

116. *Id.*

117. 553 N.E.2d 1317 (N.Y. 1990).

118. The governing documents required board approval for any pipe alteration in individual units. *Levandusky*, 553 N.E.2d at 1319.

119. *Id.* at 1323 (noting that board permitted several other unit owners to move their steam pipe risers).

120. *Id.*

c. *Breach of Fiduciary Duty*

To receive BJR protection, a board or association must not breach its fiduciary duties to the unit owners.¹²¹ The fiduciary duty of an association board consists of three elements: (1) the duty of loyalty, (2) the duty to treat all unit owners fairly and evenly, and (3) the duty of care.¹²² The duty of loyalty requires board members to act for the benefit of the association and not out of personal self-interest.¹²³ The duty to treat all unit owners fairly and evenly is most prominent in the mixed-use context where there is a distinct minority group.¹²⁴ Finally, the duty of care reinforces the common theme that board members must inform themselves of relevant material information when making decisions that affect the lives of unit members.¹²⁵

The fiduciary duty requirement is well illustrated by *Lyman v. Boonin*,¹²⁶ in which the court applied the BJR¹²⁷ to a claim challenging a policy that gave resident unit owners priority for parking spaces.¹²⁸ Noting that the board was comprised 100% of residential owners, the court denied summary judgment for the board because of the strong suggestion of self-dealing.¹²⁹ Describing self-dealing, the court observed, “there must be a demonstration of a benefit that was gained at the expense of imposing an *impermissible* burden on the other owners.”¹³⁰ The court acknowledged that a board can validly favor one group over another, but noted that a policy that forces a group of owners to subsidize an item of expense with no corresponding benefit could be grounds for invalidation.¹³¹

121. DI LORENZO, *supra* note 95, § 12:3, at 217; *see also* *Lyman v. Boonin*, 635 A.2d 1029, 1031–32 (Pa. 1993) (holding that board actions constituting self-dealing are not protected by BJR).

122. DI LORENZO, *supra* note 95, § 12:3, at 217–19.

123. *Id.* § 12:3, at 217.

124. *See infra* Part II.D.2.c for a detailed discussion of the duty to treat all unit owners fairly.

125. DI LORENZO, *supra* note 95, § 12:3, at 219.

126. 635 A.2d 1029 (Pa. 1993).

127. *See Lyman*, 635 A.2d at 1032 (holding that judicial relief will be granted where plaintiff establishes that board action is “unauthorized,” or “taken fraudulently, in bad faith, or constituted self-dealing”). Pennsylvania’s Uniform Condominium Act, 68 PA. CONS. STAT. § 5303 (2007), now requires Pennsylvania courts to review board action using a reasonableness standard rather than the BJR. *Burgoyne v. Pinecrest Cmty. Ass’n*, 924 A.2d 675, 683 (Pa. Super. Ct. 2007). *Lyman* predates the statute and is a good illustration of BJR application.

128. *Lyman*, 635 A.2d at 1030 n.1 (noting that condominium has 776 residential units but only 325 parking spaces). The board consisted solely of residential unit owners because nonresidents were not permitted to serve. *Id.* at 1030.

129. *Id.* at 1032–33 (noting that material issue of fact existed with respect to finding of self-dealing).

130. *Id.* at 1032 n.7 (emphasis added).

131. *Id.* at 1032–33 (noting that facially discriminatory action could be valid but not where financial obligations are imposed and no corresponding benefit is received).

d. *Prevailing Rationales for the BJR in Community Associations*

Because the BJR is a borrowed doctrine from corporate law, courts and scholars offer many of the same rationalizations to support its application in the context of community associations.¹³² Four rationalizations are consistent throughout community association case law and scholarship: (1) the voluntary and contractual nature of community association members militates in favor of less judicial intervention (“the contract view”),¹³³ (2) the BJR limits frivolous litigation and provides predictable guidelines to community boards,¹³⁴ (3) boards are in a better position than courts to make decisions concerning their buildings and communities,¹³⁵ and (4) the interests of those not on the board are adequately represented by board members who share similar interests.¹³⁶

The contract view supporting the BJR application in community associations is well developed throughout the case law and scholarship. Courts and scholars reason that because membership in community associations is purely voluntary, courts should defer to the board, which has the power vested in it by virtue of the governing documents.¹³⁷ The *Levandusky* court noted that “there is always the freedom not to purchase” a unit.¹³⁸ Moreover, the nature of the contract, which some scholars classify as relational, militates in favor of less judicial intervention.¹³⁹ According to the contract view, it would be impossible for the governing documents to contemplate all potential future circumstances, and therefore courts should extend latitude to board decisions.¹⁴⁰ The contract rationale is also based on the notion that homeownership is typically “the largest single investment most people will make,” so there is adequate incentive for unit owners to review the governing documents prior to purchase.¹⁴¹

A second rationale for the BJR is that it limits the amount of litigation in the context of community associations.¹⁴² Because board decisions often result in

¹³² See Goldberg, *supra* note 87, at 664–69 (discussing BJR in context of viewing community association as corporation).

¹³³ See, e.g., *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1320–21 (N.Y. 1990) (discussing voluntary nature of agreement to be governed by association board); Gwirtzman, *supra* note 78, at 1022–23 (noting that standard of review has been deferential because of stability established by contractual relationship).

¹³⁴ See, e.g., Goldberg, *supra* note 87, at 667–68 (“The business judgment doctrine is suited to thwarting the subjective gripes of an owner who merely does not agree with the decision of the board.”).

¹³⁵ *Levandusky*, 553 N.E.2d at 1322 (quoting *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979)).

¹³⁶ Sterk, *supra* note 71, at 297–98 (discussing reasons for BJR).

¹³⁷ *Levandusky*, 553 N.E.2d at 1320–21.

¹³⁸ *Id.* at 1320.

¹³⁹ *Id.* at 1321–22; see also Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1415 (1994) (noting that association agreements resemble relational contracts).

¹⁴⁰ *Levandusky*, 553 N.E.2d at 1321–22.

¹⁴¹ Sterk, *supra* note 71, at 301 (citing Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 60–61 (1990)).

¹⁴² *Levandusky*, 553 N.E.2d at 1322–23.

“highly charged and emotional” exchanges involving multiple competing views, dissatisfied owners should not be offered every opportunity to reopen the matter before a court.¹⁴³ Permitting such unbridled litigation, the *Levandusky* court reasoned, would lead to the instability of the community.¹⁴⁴ A logical corollary to this argument is that board membership is typically uncompensated and purely voluntary.¹⁴⁵ To that end, a deferential standard of review is necessary so as not to discourage board members from serving because they fear expensive and time-consuming lawsuits.¹⁴⁶

A third rationale for BJR application is that courts are “ill-equipped” to evaluate what are essentially business judgments, a recurring theme from the corporate setting.¹⁴⁷ In *Levandusky*, the court addressed the apparent disconnect between the corporate world, where board members and managers are highly skilled, with the lay qualifications characteristic of community association boards, observing that “[e]ven if decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at the least board members will possess experience of the peculiar needs of their building and its residents not shared by the court.”¹⁴⁸ Thus, the expertise of the board members comes not from their educational or technical backgrounds, but rather from their familiarity with the building and community itself.¹⁴⁹

A fourth rationale for protecting board action with the BJR is the naturally occurring alignment of association ownership interests. In the context of residential community associations, courts that adopt the BJR standard of review believe that all residential unit owners share similar long-term goals for their unit—namely, to either maintain or grow the value of their investment.¹⁵⁰ That being the case, “standard economic behavior of cost minimization or built-in protections against inequalities,” such as those contained in the governing documents, will ensure that those members not on the board will be assured of adequate representation of their interests.¹⁵¹ Furthermore, community associations are generally comprised of similarly economically situated members, and thus “community association governance rules are unlikely engines for significant wealth redistribution.”¹⁵² Therefore, a deferential judicial approach to

143. *Id.* at 1322.

144. *Id.*; see also Goldberg, *supra* note 87, at 674 (noting reasonableness standard leaves board decisions too vulnerable to judicial second guessing).

145. See Gillette, *supra* note 139, at 1428 (noting that unlike corporate board members, association board members have little to gain financially).

146. See *id.* (discussing general lack of incentives of board service).

147. *Levandusky*, 553 N.E.2d at 1322. See *supra* Part II.A.2 for a discussion of the “ill-equipped courts” rationale in the corporate setting.

148. *Levandusky*, 553 N.E.2d at 1322.

149. *Id.*

150. See Gwirtzman, *supra* note 78, at 1027 (noting economic decisions by boards will affect each unit owner equally).

151. *Id.*

152. Sterk, *supra* note 71, at 297 (critiquing various rationales for deferential review of association rule making).

board decisions such as the BJR is preferable to other standards, such as the reasonableness approach, which allows courts to substitute their judgment for that of the boards.

C. *The Reasonableness Standard: A Two-Step Approach*

The majority of jurisdictions apply a reasonableness standard to community association disputes.¹⁵³ Under a reasonableness review, courts take a two-step approach. First, they apply a highly deferential standard of review for disputes concerning rules and regulations contained in the governing documents themselves or in force prior to the complainant's purchase.¹⁵⁴ Second, they apply a less deferential reasonableness standard for rules not specifically mandated by the governing documents.¹⁵⁵ This approach is necessary, its proponents argue, to ensure the reliance interest of all unit members, both majority and minority alike.¹⁵⁶

1. Step One: Rules and Regulations Contained in Governing Documents and in Force Prior to Purchase Receive BJR-like Review

Courts in reasonableness jurisdictions treat rules and regulations contained in or directly implied by the governing documents as covenants running with the land.¹⁵⁷ Courts presume that such rules, regulations, and board actions are valid on the theory that unit owners are on at least constructive notice since governing documents are available for inspection prior to their purchase.¹⁵⁸ Similar to the BJR, the action is generally enforced unless the plaintiff can demonstrate that the action is “‘wholly arbitrary’” (in BJR terms, “bad faith”), in “‘violation of [a sound] public policy,’” or that the action, rule, or regulation “‘abrogate[s] some fundamental constitutional right.’”¹⁵⁹ Many courts in reasonableness jurisdictions call this analysis “reasonableness review” but as the court in *Ridgely Condominium Association, Inc. v. Smyrnioudis (Ridgely I)*¹⁶⁰ noted, a rule, regulation, or board action specifically mandated by the declaration “‘may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.’”¹⁶¹ Enforcement of such restrictions is necessary, reasonableness courts

153. See *supra* note 69 and accompanying text for a discussion of prevailing community association case law.

154. *Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc.*, 878 P.2d 1275, 1284 (Cal. 1994) (in bank).

155. *Id.*

156. *Id.*

157. See, e.g., *Ridgely Condo. Ass'n, Inc. v. Smyrnioudis (Ridgely I)*, 660 A.2d 942, 947 (Md. Ct. Spec. App. 1995) (citing *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981)) (discussing restrictions contained in governing documents).

158. *Id.* at 948.

159. *Id.* at 947 (quoting *Hidden Harbour*, 393 So. 2d at 639–40).

160. 660 A.2d 942 (Md. Ct. Spec. App. 1995).

161. *Ridgely I*, 660 A.2d at 947 (quoting *Hidden Harbour*, 393 So. 2d at 640).

claim, to protect the reliance interest of buyers who pay a premium for a community's restrictive scheme.¹⁶²

2. Step Two: Rules and Regulations Not Specifically Mandated by Declaration and Enacted After Purchase Receive Reasonableness Review

Imposing a reasonableness standard on board or association action not specifically mandated in the governing documents causes association boards to exercise caution. Freed from the bounds of the BJR's process-based approach, a court will reach the substance of the disputed action if the action involves the enactment of a new rule or policy after the complainant purchased her unit. The standard, reasonableness courts claim, forces boards to enact rules and regulations that "reasonably relate[] to the promotion of the health, happiness and peace of mind of [all classes of] unit owners," not simply the majority class.¹⁶³ In *Ridgely I*, the court enunciated this goal: "The requirement of 'reasonableness' in these instances is designed to somewhat fetter the discretion of the board of directors."¹⁶⁴

D. Mixed-Use Community Associations

While much scholarship and case law exists in the context of residential community associations, there is little dealing specifically with mixed-use community associations. Mixed-use community associations present very different structural and conceptual problems than community associations comprised solely of residential units. Nonetheless, mixed-use projects are becoming more and more popular because of the "increasing scarcity of land, urban revitalization, and the increased focus on smart growth."¹⁶⁵

A mixed-use community can be comprised of residential, commercial, and sometimes even lodging or hotel units.¹⁶⁶ Within mixed-use communities, there is a diverse range of competing interests.¹⁶⁷ For example, residential homeowners typically have an interest in growing the value of their home investment, but they also seek to ensure that their living space is peaceful, safe, and free of unnecessary disruption with limited public access.¹⁶⁸ Commercial unit owners also seek to grow the value of their investment, but they typically seek unrestricted public access to their stores.¹⁶⁹ Further, commercial unit owners

162. *Nahrstedt v. Lakeside Vill. Condo. Ass'n, Inc.*, 878 P.2d 1275, 1284 (Cal. 1994) (in bank).

163. *Ridgely I*, 660 A.2d at 948 (quoting *Hidden Harbour*, 393 So. 2d at 640).

164. *Id.* (citing *Hidden Harbour*, 393 So. 2d at 640).

165. Winston, *supra* note 2, at 1.

166. Bernard Meyer, *Understanding the Mixed Use Association*, ASS'N TIMES, Jan. 2005, <http://www.associationtimes.com/articles2005/mixeduse0105.htm>.

167. *Id.*

168. *Id.*; see also Gwirtzman, *supra* note 78, at 1038–41 (addressing habitat issues within residential community associations as distinct from economic issues of association).

169. See Meyer, *supra* note 166 (discussing competition between homeowners and commercial interests).

have location-specific concerns linked to the goodwill value of their business¹⁷⁰ and tend to seek predictable property assets to maximize investment and financing potential.¹⁷¹

1. The Mixed-Use Challenge and Practitioners' Practical Solution

Cognizant of the potential for problems within a mixed-use community, lawyers typically advise residential and commercial owners to use caution when purchasing their units.¹⁷² Upon inspection, residential buyers may find that the governing documents place much of the decision-making power in the hands of the commercial units, or, alternatively, commercial units might be subject to the will of association boards, comprised largely of homeowners with whom they have very little in common.¹⁷³ A common theme in the case law is that community association boards comprised largely of residential unit owners often disapprove of and reject proposed uses of retail space, such as proposals for sidewalk sales, signage, and extended store hours.¹⁷⁴ Control in this way can significantly decrease the market value of a commercial unit, making it difficult for potential purchasers to obtain adequate financing.¹⁷⁵

Modern developers, eager to lure commercial business to their projects, are beginning to include reservation language in the governing documents permitting any lawful commercial retail purpose.¹⁷⁶ Some practitioners now use other structural-based solutions to help mitigate sharing problems between

¹⁷⁰ As opposed to residential unit owners, commercial unit owners must consider the value of their business that is tied solely to location. *See, e.g.*, *N. Clackamas Cmty. Hosp. v. Harris*, 664 F.2d 701, 704 (9th Cir. 1980) (noting that goodwill is asset that figures significantly in valuation of business); *Didlake v. Roden Grocery Co.*, 49 So. 384, 386 (Alaska 1909) (defining goodwill of business as customers' propensity to return to specific location); *Slate Co. v. Bikash*, 177 N.E.2d 780, 782 (Mass. 1961) (noting that business's goodwill included location, which enabled customer retention); *Murray v. Bateman*, 51 N.E.2d 954, 955 (Mass. 1943) (noting that goodwill results when name, location, and reputation give advantages which allow businesses to retain customers); *Maitland v. Slutsky*, 275 N.W. 726, 728 (Mich. 1937) (noting that "[g]ood will may be attached to the particular place where the business is conducted" but that it is not "necessarily dependent upon locality"); *Roth v. Roth*, 406 N.W.2d 77, 80 (Minn. Ct. App. 1987) (defining goodwill as amount buyer would pay for going concern above book value of assets); *Dugan v. Dugan*, 457 A.2d 1, 4–5 (N.J. 1983) (holding that goodwill is necessarily attached to going business, is related to name, location, and reputation, and tends to enable business to retain patronage); *Nashville Prods., Inc. v. Flats Waterfront Assocs.*, 699 N.E.2d 955, 958 (Ohio Ct. App. 1997) (noting that goodwill of business does not "automatically attach[] to the real property where the business itself is being conducted").

¹⁷¹ J. Christopher Kinsman, *Forming the Mixed-Use Community: How to Avoid the Pitfalls of Sharing*, COLO. REAL EST. J., June 20, 2007, available at <http://www.fwlaw.com/Resources/Articles/RealEstateArticles/FormingtheMixedUseCommunity/tabid/235/Default.aspx>.

¹⁷² *Id.*; Meyer, *supra* note 166.

¹⁷³ Meyer, *supra* note 166.

¹⁷⁴ Scott E. Mollen, *Realty Law Digest*, N.Y.L.J., Mar. 30, 2005, at 5.

¹⁷⁵ *Id.* ("Lenders do not want to lend money on properties that may remain vacant while an owner fights with a board over a proposed use.")

¹⁷⁶ *Id.* (discussing trend to include reservation language in governing documents).

various classes of unit owners, such as the use of cross easements,¹⁷⁷ separate associations,¹⁷⁸ and the creation of separate voting classes.¹⁷⁹

2. Disputes in Mixed-Use Communities—The BJR Versus the Reasonableness Standard

Even though there are competing interests at stake in mixed-use community associations that are not present in purely residential communities, courts apply the standard of judicial review uniformly in BJR jurisdictions.¹⁸⁰ In reasonableness jurisdictions, however, some courts recognize the need for a more tailored judicial approach to the mixed-use community.¹⁸¹ A considerable number of the disputes in the mixed-use context center on whether an assessment scheme implemented by the board is within the scope of its powers, whether the action bears a legitimate relation to the well-being of the community (i.e., whether the act was taken in bad faith), or whether a particular regulation results in a justifiable redistribution of market value.

a. Assessment Schemes—Charging for Uncommon Elements

In *Board of Managers of the 229 Condominium v. J.P.S. Realty Co.*¹⁸² the board sued a commercial unit owner who withheld assessment payments for elements that she claimed were uncommon and only pertained to residential units.¹⁸³ Applying the BJR, the trial court first granted summary judgment for the condominium, holding that the board's allocation of common charges and special assessments were subject to BJR protection and the broad power granted to the board by the governing documents shielded the substance of the decision

177. Cross easements can work when residential and commercial units are on separate legal parcels and create stable and predictable relationships. Kinsman, *supra* note 171. As Kinsman notes, such easements may frustrate long term coexistence because of their inflexible nature in light of the relational contracts governing community associations. *Id.*

178. The master association governs only those truly common elements of the community while separate associations regulate all other matters unique to the residential and commercial interests. *Id.* The problem, however, is such multi-association communities can become very complex. See Terry Sheridan, *Mixed-Use Unit Owners in for Surprise*, PALM BEACH DAILY BUS. REV., June 30, 2005 (noting that shared elements such as lobbies can be held in master association with boards comprised equally of residential and commercial, regardless of proportionate share of community).

179. Creation of separate voting classes can be used where there is a large imbalance of commercial and residential units. Kinsman, *supra* note 171.

180. See *infra* Part III.A.1–2 for a discussion of the uniform application of the BJR across mixed-use and purely residential communities.

181. See, e.g., *Ridgely Condo. Ass'n, Inc. v. Smyrnioudis (Ridgely I)*, 660 A.2d 942, 950 (Md. Ct. Spec. App. 1995) (noting that where minority interests compete with majority interests in community association, judicial deference to board action is inappropriate). See *infra* Part III.B for a discussion of the *Ridgely I* court's reasoning.

182. 764 N.Y.S.2d 405 (N.Y. App. Div. 2003).

183. *Bd. of Managers of the 229 Condo.*, 764 N.Y.S.2d at 406–07. The condominium at issue was comprised of four commercial units making up eight percent interest in the common elements, two professional units making up three percent, and fifty apartments constituting eighty-nine percent. *Id.* at 406.

from judicial review.¹⁸⁴ The appellate court ordered the trial court on remand to conduct a strict contract analysis to determine whether each assessment was considered “common” pursuant to the terms of the governing documents.¹⁸⁵ The appellate court dismissed the commercial unit owner’s argument that the BJR was inapplicable in light of the “inherent conflict of interest with regard to the residential” unit dominance of the board, all of whom benefited at the expense of the commercial owners.¹⁸⁶

The Massachusetts Appellate Court applied a reasonableness standard to a similar set of facts in *Blood v. Edgar’s, Inc.*¹⁸⁷ In *Blood*, the condominium board rolled a residential rental program into the common elements of the association, obligating commercial unit owners to contribute.¹⁸⁸ Noting that the rental program was not in place at the time of original purchase, the court held that the commercial unit owner was entitled to have her reasonable expectations at the time of purchase enforced.¹⁸⁹ Unlike many other shared elements, such as roofs, walkways, and utility rooms, the rental program benefited only residential owners and thus the court determined that its inclusion in common elements was unreasonable in light of the commercial unit owner’s reliance interest.¹⁹⁰

b. Regulations Resulting in Redistribution of Market Value

Another fertile ground for disputes in mixed-use associations arises when a board makes a decision that redistributes market value from one category of units to others.¹⁹¹ Many associations that pass such rules do so under the cover of some allegedly legitimate community purpose.¹⁹² The case of *Ridgely Condominium Association, Inc. v. Smyrnioudis (Ridgely II)*,¹⁹³ from Maryland, a reasonableness jurisdiction, provides a good example. The condominium building in *Ridgely II* was comprised of 239 units, seven of which were commercial while all the others were residential.¹⁹⁴ The commercial units were accessible both through the condominium lobby as well as through the storefronts facing the adjacent street.¹⁹⁵ Because the association was experiencing security problems that it attributed, in part, to commercial traffic through the lobby, the membership voted to amend the by-laws to prohibit lobby

184. *Id.* at 407.

185. *Id.* at 408.

186. *Id.*

187. 632 N.E.2d 419 (Mass. App. Ct. 1994).

188. *Blood*, 632 N.E.2d at 420–21.

189. *Id.* at 423.

190. *Id.*

191. See Sterk, *supra* note 71, at 285–86 (noting that association majorities often implement rules increasing value of many at expense of few).

192. *Id.*

193. 681 A.2d 494 (Md. 1996).

194. *Ridgely II*, 681 A.2d at 496.

195. *Id.*

use by commercial customers.¹⁹⁶ The commercial unit owners brought an action “seeking to enjoin the enactment [and] enforcement of [the rule].”¹⁹⁷

The trial court and the Special Appeals Court both conducted a reasonableness examination of the rule and found that it was unenforceable because it did not “reasonably relate to the health, happiness and enjoyment of unit owners.”¹⁹⁸ Acknowledging that safety concerns did give rise to the rule, and thus the appearance of legitimacy was present, the trial court found that there were no significant factual findings to substantiate the board’s determination that the security problem was, in fact, caused by commercial traffic.¹⁹⁹ Moreover, under the reasonableness standard, the trial court held that the blanket use restriction was not the “least intrusive method, or the best means available” to obtain more secure premises in light of the commercial unit owners’ significant economic interest in offering lobby access for their customers.²⁰⁰ Acknowledging the soundness of the lower court’s reasonableness analysis, the court of appeals, sua sponte, rejected the use restriction based on a traditional real property analysis.²⁰¹ The appeals court treated the lobby use restriction as an impermissible taking of the commercial unit owners’ interest in property appurtenant to their units.²⁰²

c. *Bad Faith and Fiduciary Duty in Mixed-Use Rule Making*

To avoid BJR protection, commercial unit owners in mixed-use communities challenge board decisions on the grounds of bad faith and breach of the fiduciary duty to treat all owners fairly and evenly. In *Louis & Anne Abrons Foundation, Inc. v. 29 E. 64th Street Corp.*,²⁰³ the plaintiff commenced an action seeking a declaratory judgment that an enacted sublet fee affecting only commercial units was null and void.²⁰⁴ Because a use restriction prohibiting residential subleases was in place at the time the board instituted the sublet fee, the court concluded that there was a material issue of fact as to whether the board acted in bad faith.²⁰⁵ Reversing the trial court’s grant of summary judgment for the condominium association, the court held that a cooperative must treat its members “fairly and evenly,” and “[a]ny departure from uniform

196. *Id.* at 497.

197. *Id.*

198. *Id.* at 498 (internal quotation marks omitted).

199. *Ridgely II*, 681 A.2d at 498.

200. *Id.* (internal quotation marks omitted).

201. *Id.* at 498–501.

202. *Id.* No BJR jurisdiction seems to have adopted this real-property approach in reviewing community association use restrictions.

203. 746 N.Y.S.2d 482 (N.Y. App. Div. 2002).

204. *Louis & Anne Abrons Found.*, 746 N.Y.S.2d at 483. The mixed-use condominium at issue was comprised of forty-three residential units while the ground floor was comprised of seven commercial units owned by the plaintiff. *Id.* at 482–83.

205. *Id.* at 484 (noting rule had discriminatory effect despite appearance of neutrality).

treatment of shareholders must be in furtherance of a justifiable and bonafide business purpose.”²⁰⁶

Another case brought by a commercial owner in a mixed-use community involving claims of bad faith and breach of the fiduciary duty to treat all unit owners fairly and evenly is *Schultz v. 400 Cooperative Corp.*²⁰⁷ In *Schultz*, the plaintiff, a psychotherapist, purchased her commercial cooperative unit to use as her office and residence subject to a \$300 monthly professional fee.²⁰⁸ After the first year, the plaintiff negotiated with the cooperative board to replace the fee with an increased allocation of shares to her unit, which would result in a greater responsibility for common area charges.²⁰⁹ After the plaintiff retired and converted her unit back to residential purposes ten years later, she asked the board to remove the increased allocation.²¹⁰ When the board refused, the plaintiff sued, claiming that the allocation scheme forced commercial units to pay a disproportionate share of the common area charges.²¹¹ The trial court denied BJR protection because it found discrimination against the commercial units, however, the appellate court reversed.²¹² Because the rule affected all commercial units equally, the court determined that there was no harmful treatment and stated that “the [BJR] insulates the board’s exercise of its managerial prerogative from plaintiffs’ indiscriminate attack.”²¹³

Mixed-use community associations present a perfect storm of competing interests, and as the next Part demonstrates, the BJR is insufficient to adequately resolve disputes while respecting the reliance interests of all unit owners forced to coexist in the community.

206. *Id.* (quoting *Smolinsky v. 46 Rampasture Owners, Inc.*, 646 N.Y.S.2d 110, 112 (N.Y. App. Div. 1996)). The court further provided that the BJR permits review of a decision when a board’s action deliberately singles out an individual for harmful treatment. *Id.*

207. 736 N.Y.S.2d 9 (N.Y. App. Div. 2002).

208. *Schultz*, 736 N.Y.S.2d at 10.

209. *Id.*

210. In connection with that effort, the plaintiff incurred considerable expense to amend her certificate of occupancy, in accordance with co-op policy. *Id.* at 11.

211. *Id.*

212. *Id.* at 14.

213. *Schultz*, 736 N.Y.S.2d at 14 (citing *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1317 (N.Y. 1990)). In addition to the court’s BJR argument, it reversed on contract grounds as well, finding that the board was under no obligation to “absorb the financial impact of plaintiffs’ exercise of [her option to convert to residential use] by reducing monthly maintenance charges through a downward revision in the shares allocated to their unit.” *Id.* at 13.

III. CONCLUSION

The law governing community association disputes is split, with a majority of states adopting a reasonableness standard and a minority of states implementing the BJR standard of review.³³² Jurisdictions adopting the BJR developed their community association law largely in the context of the purely residential project.³³³ In the residential setting, where all association members own comparable properties, are likely situated in a similar economic fashion, and share a considerable number of interests relating to the community, arguments supporting application of the highly deferential BJR have some force.³³⁴ However, the emergence of the more complex mixed-use project calls into question many of the assumptions on which BJR application rests.³³⁵

In the mixed-use setting, condominiums, cooperatives, and other community association structures are no longer comprised solely of members with the naturally aligned interests that convinced the courts to adopt the BJR as a standard of review for resolving disputes. Rather, within mixed-use projects, clearly identifiable minority groups exist: typically the ground-floor commercial unit owners, whose ability to earn a living is often dependent on association board decisions. Because of the power structure provided for in the governing documents, such boards consist predominantly of residential members who share very little in common with their commercial neighbors.

The BJR's process-based approach to reviewing disputes more often than not results in blanket protection for board decisions without consideration of the substance of the rule or regulation itself.³³⁶ The rigors of overcoming the BJR presumption that board decisions are valid leave the reliance interests of the minority class subject to the beneficence of the residential-dominated board. In a mixed-use community where "[t]he basic nature . . . naturally creates competing

327. See, e.g., *Mulligan v. Panther Valley Prop. Owners Ass'n*, 766 A.2d 1186, 1190–91 (N.J. Super. Ct. App. Div. 2001) (discussing state of community association law around country); *Arabian*, *supra* note 22, at 11–18 (discussing standards of review in jurisdictions and noting majority adopt reasonableness).

328. See *supra* notes 237–48 and accompanying text for a discussion of the adoption of the BJR in a residential context.

329. See *supra* notes 150–52 and accompanying text for a discussion of the internal alignment of interests in a purely residential context.

330. See *supra* Part III.A.3 for an argument that none of the BJR rationalizations apply in the mixed-use context.

331. See *supra* Part III.B for an illustration of the failure of the BJR's process-based approach to reach the substance of claims.

interests between the residential and commercial owners,”³³⁷ courts should critically reevaluate their earlier decisions to apply the BJR and fashion a separate standard of review.

The reasonableness standard is better suited than the BJR to balance the competing interests inherent in a mixed-use community and to ensure the reliance interests of all unit owners. Because of the reasonableness standard’s two-tiered approach,³³⁸ courts are properly restrained from second-guessing decisions made when the complaining unit owners had full notice to the disputed rule, regulation, or other board action, but at the same time, courts have the flexibility to reach the substance of rules and regulations that may unfairly deprive unit owners of their reasonable reliance interests in their investments.

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